Petition

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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

RICHARD B. OGILVIE, Trustee Of The Chicago, Milwaukee, St. Paul & Pacific Railroad Company; STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION; STATE OF SOUTH DAKOTA; PORT OF PEND OREILLE; PEND OREILLE VALLEY RAILROAD COMPANY, INC.; SEATTLE & NORTH COAST RAILROAD COMPANY; FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; GIRARD BANK, as Indenture Trustee; HARRIS TRUST AND SAVINGS BANK, as Indenture Trustee; and the CHICAGO MILWAUKEE CORPORATION;
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

In the opinion of petitioner Railway Labor Executives' Association (RLEA),* the following questions are presented by this petition:

1. Does a railroad reorganization court have the discretion to authorize a Trustee of a railroad in reorganization to defer to some unspecified future date the payment of benefits which Congress has mandated be imposed to aid employees bear the economic consequences of abandonments by that Trustee of his railroad's lines?

2. Do the levels of employee protection required by 49 U.S.C. §11347 and 45 U.S.C. § 904 require the Milwaukee Railroad Reorganization Court to obligate purchasers of Milwaukee Railroad lines, which are to be used in continued rail operations, to honor the employee protective provisions mandated by those statutes?

3. Does 45 U.S.C. § 904(b) govern the sale or transfer of Milwaukee Railroad lines for continued rail operations to newly formed railroads or to other non-carrier purchasers?

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* Petitioner Railway Labor Executives' Association (RLEA) is a voluntary, unincorporated association of the Chief Executive Officers of virtually all of the standard labor organizations which represent railroad employees; however, several of RLEA's member organizations are individually represented in the Milwaukee Railroad reorganization proceeding and, thus, have not participated in this appeal and petition. Those RLEA member organizations which are participating herein are listed in Appendix H which is attached to this petition. While many other parties have appeared before the reorganization court in the reorganization proceeding, not all have expressed an interest in this matter. RLEA has listed as respondents herein only those parties who have actively participated in the appeals before the court of appeals or who have filed written objections to RLEA's position before the reorganization court.

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RICHARD B. OGILVIE, Trustee Of The Chicago, Milwaukee, St. Paul & Pacific Railroad Company; STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION; STATE OF SOUTH DAKOTA; PORT OF PEND OREILLE; PEND OREILLE VALLEY RAILROAD COMPANY, INC.; SEATTLE & NORTH COAST RAILROAD COMPANY; FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; GIRARD BANK, as Indenture Trustee; HARRIS TRUST AND SAVINGS BANK, as Indenture Trustee; and the CHICAGO MILWAUKEE CORPORATION;
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Railway Labor Executives' Association [hereinafter, "RLEA"] respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review and to reverse a decision by that court which was entered on August 17, 1981, affirming several orders of the United States District Court for the Northern District of Illinois which construed Section 5 of the Milwaukee Railroad Restructuring Act [hereinafter, "MRRA"], 45 U.S.C. § 904, in a manner, petitioner submits, contrary to the language of the statute. RLEA had taken four (4) separate appeals to the Seventh Circuit from orders of the District Court which were entered while that court was sitting as a railroad reorganization

court for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company [hereinafter, "MILW"] under Section 77 of the Bankruptcy Act, 11 U.S.C. § 205. [1] Those appeals were consolidated by the court of appeals and were thereafter denied by the decision which petitioner is asking this court to review.

OPINIONS BELOW

The decision by the court of appeals, which is reproduced as Appendix B in the separately bound Appendix to this Petition, is reported as *In re Chicago, M. St. P.&P.R.*, 658 F.2d 1149 (7th Cir. 1981). The judgment of the court of appeals is reproduced in the separate Appendix as Appendix G. None of the decisions by the District Court are reported; they are reproduced in the separate Appendix to this petition as Appendices C-1 (Order No. 276-B, entered February 29, 1980, overruling objections to the report of a special master recommending the abandonment of eighteen (18) branch lines), C-2 (Order No. 276-C, entered February 29, 1980, authorizing with conditions the abandonment of those eighteen (18) branch lines), D-1 (Order No. 274-A, entered January 4, 1980, preliminarily approving the sale of a line of the MILW), D-2 (Order No. 297, entered February 29, 1980, granting the Trustee's request to abandon certain rail lines for subsequent sales, including the line involved in Order No. 274-A), D-3 (Order No. 297-A, entered February 29, 1980, authorizing the abandonment and sale of those lines), E-1 (Order No. 307, dated April 1, 1980, overruling objections to the report of a special master recommending the abandonment of all MILW rail lines west of Miles City, Montana), E-2 (Order No. 307-A, dated April 2, 1980, authorizing with conditions the Lines West abandonment), F-1 (Order No. 281-A, entered February 19, 1980, authorizing the abandonment and sale of certain MILW lines in Wisconsin), F-2 (Order No. 281-B, entered March 10, 1980, authorizing the abandonment and sale of other MILW lines in Wisconsin), and F-3 (Order No. 281-C, docketed March 31, 1980, a

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[1] Section 77 of the Bankruptcy Act has been repealed by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, but that repeal is not effective for cases which were pending under Section 77 when the Reform Act was enacted. Section 403(a), 92 Stat. 2683.

minute order denying RLEA's request to alter or to amend Orders No. 281-A and No. 281-B).

A special master was employed by the reorganization court to report on several of the proposed abandonments; his reports are not reported. Relevant portions of those reports are reproduced in the separate appendix as Appendix C-3 (Report dated February 20, 1980, on eighteen (18) branch line abandonments at issue in Orders No. 276-B and No. 276-C) and Appendix E-3 (Report dated February 29, 1980, on abandonment of lines west of Miles City, Montana at issue in Orders No. 307 and No. 307-A).

The Interstate Commerce Commission has also issued several decisions and advisory reports which are involved in these cases; none of those decisions or reports are reported. The more pertinent ones are reproduced in relevant part as Appendices E-4 (Report in Docket AB-7 (Sub-No. 86) on abandonment of lines west of Miles City, Montana, served January 30, 1980), F-4 (Decision in Finance Docket No. 29237, served February 1, 1980, approving the acquisition of certain MILW lines by the State of Wisconsin) and F-5 (Decision in Finance Docket No. 29237, served February 29, 1980, approving the acquisition of other MILW lines by the State of Wisconsin).

JURISDICTION

The decision and judgment of the court of appeals were entered on August 17, 1981, and neither a petition for rehearing nor a suggestion for rehearing *en banc* was filed. Beginning with an order dated November 6, 1981, petitioner has been granted four (4) extensions by this Court to file this petition, the last extension having been granted on December 29, 1981, extending the time in which this petition may be filed to and including January 4, 1982. *RLEA* v. *Ogilvie*, Sup. Ct. No. A-399. This petition has been filed within that extended time period and within one hundred and fifty (150) days of the date of the court of appeals ruling. 28 U.S.C. § 2101(c). Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves questions concerning the scope of the abandonment and the sale or transfer provisions of Sections 5(a) and (b) of the MRRA, 45 U.S.C. §§ 904(a) and (b), and the proper interpretation to be given to the employee protective provisions in those subsections, as qualified by Section 5(c) of the Act. Section 5 of the MRRA is reproduced in Appendix A to this petition. Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347, and Sections 405(a) through (c) of the Rail Passenger Service Act, 45 U.S.C. §§ 565(a)-(c), are also relevant to this petition and are reproduced in Appendix A hereto.

STATEMENT OF THE CASE

Originally incorporated in 1847 under a special act of the Territory of Wisconsin as the Milwaukee and Waukesha Railroad Company, the MILW grew by expansions and acquisitions so that by 1899 it operated a system of almost 6,200 miles of rail lines from Missouri to Wisconsin and west to South Dakota. ICC Docket AB-7 (Sub-No. 86), *Richard B. Ogilvie, Trustee—Abandonment* [hereinafter, "*Lines West Abandonment Report*"], served January 30, 1980, at 3-4. In the early 1900's, a line was constructed from the MILW's midwestern terminus to the Pacific Coast through the northwestern States, and on January 1, 1913, that Pacific Coast Extension became a part of the MILW. *Id.* at 5. By 1977 the MILW was the seventh largest railroad in this country operating approximately 9,800 miles of track in sixteen (16) states. *Id.* at 16. Unfortunately, its size did not assure its financial health.

In 1925 the MILW was placed into an equity receivership because of its poor financial condition, and several years after it was reorganized its financial problems once again caused it to undergo a reorganization, this time in 1935 under Section 77 of the Bankruptcy Act. *Lines West Abandonment Report* at 6-7. That reorganization proceeding lasted for ten (10) years. *Id.* By December 1977, however, the MILW's financial posture had once again deteriorated, and after having sustained losses of approximately $105 million in the three (3) preceding years (apart from earnings of subsidiaries), the MILW filed

a petition for reorganization under Section 77 on December 19, 1977. *In re Chicago, M. St. P.&P.R., Debtor*, N.D. Ill. No. 77 B 8999. Mr. Stanley E.G. Hillman was appointed as Trustee on January 19, 1978, and began to operate the MILW properties.

A. The Trustee's Response To The MILW's Crises

Shortly after Mr. Hillman was appointed Trustee, he began to examine the MILW's route structure and concluded that the railroad must rid itself of non-profitable trackage if it were to be successfully reorganized. Thereafter, Mr. Hillman, as Trustee (*see*, 49 U.S.C. §§ 10102(16) and (18)), began to seek the approval of the Interstate Commerce Commission to abandon various portions of the MILW system. While most of the abandonment applications filed by the Trustee in 1978 and 1979 were for relatively small segments of track, on August 8, 1979, the Trustee filed an application with the Commission to abandon all of the trackage west of Miles City, Montana—a total of 2,497.7 miles of rail line—which included most of the Pacific Coast Extension added in 1913. *Lines West Abandonment Report* at 17-18.

While Mr. Hillman, and then his successor, Richard B. Ogilvie, were attempting to restructure the MILW configuration through the administrative processes under the Interstate Commerce Act, the MILW continued to sustain losses even though its cash flow was aided by Section 77 of the Bankruptcy Act. In April 1979, Trustee Hillman petitioned the Reorganization Court for authority to "embargo" approximately 6,000 miles of the MILW structure because the full system could not be operated without continuing to incur substantial cash deficits. That request was denied in June 1979, and while the Trustee was appealing that decision to the United States Court of Appeals for the Seventh Circuit, a second request to embargo was filed in August 1980. Trustee Ogilvie prosecuted that request successfully, and on September 26, 1979, the Reorganization Court authorized an embargo of approximately two-thirds of the MILW system effective November 1, 1979. On October 2, 1979, the Court of Appeals decided the first embargo appeal and concluded that the MILW Reorganization Court had the authority to authorize the suspension of operations over a portion of the debtor's system through its

control over the borrowing authority. *In re Chicago, M. St. P.&P.R.*, 611 F.2d 662 (7th Cir. 1979). Faced with the imminent cessation of operations over much of the MILW system, including all of its operations west of Miles City, Montana, Congress began to consider actively legislation which became the MRRA on November 4, 1979. Pub. L. No. 96-101, 93 Stat. 736, 45 U.S.C. § 901, *et seq.*[2]

At the time that the MILW Trustee concluded in 1978 that the MILW rail system must be restructured to assure the survival of that railroad, the Trustee was required by Sections 77(c)(2) and 77(o), and by the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, to first obtain the approval of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] before any MILW rail lines were abandoned or sold. According to the Trustee, that requirement posed two distinct problems for the MILW. First, the procedures necessary to obtain such ICC approval were not as quick as the Trustee considered to be required by the MILW's financial plight. And second, the ICC was required by 49 U.S.C. §§ 10903(b)(2) and 11347 to impose a fair arrangement to protect railroad employees affected by such abandonments or sales; the potential costs for such protections, the Trustee argued, would destroy any chance of a successful reorganization. *Trustee's Plan of Reorganization* [hereinafter, "*1979 Plan of Reorg.*"], dated August 10, 1979, at 48-53.

In order to solve both problems, the Trustee urged the ICC to act quickly on his lines west abandonment request, and he took the position before the ICC that the requirement that a fair arrangement be imposed to protect employees did not give the Commission the authority to require the payment of such protective benefits. That position on employee protection was expounded upon in the Trustee's 1979 Plan of Reorganization where the Trustee estimated that "labor protection claims [under the Interstate Commerce Act's conditions] would be in the vicinity of $325 million." *1979 Plan of Reorg.*, at 51. As he then explained, the magnitude of that potential obligation required that the payment of any such employee protection be defer-

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[2] Pursuant to the September 26th embargo order, the MILW ceased operations over most of its system on November 1, 1979. On November 6, 1979, the reorganization court suspended its embargo order.

red until the reorganization was completed, and that those benefits be assigned a priority subordinated to all but shareholder claims. *Id.* at 44.

RLEA vigorously opposed the Trustee's position on employee protection because it was clear from even the Trustee's own estimates that his restructuring would have a substantial and adverse impact on MILW employees. According to the Trustee's figures, the transition from the pre-petition MILW to the reorganized MILW would cause a reduction in jobs of approximately 40%, or 4,000 jobs, with many of the remaining 6,000 employees being required to relocate or take lower paying jobs within the restructured carrier.[3] *1979 Plan of Reorg.*, at 10-11. Approximately 1,500 dismissals were expected to occur from the lines west abandonment alone. *Lines West Abandonment Report* at 90, Appendix E-4 at 101a. Rail Labor estimated that the impact of the lines west abandonment on employees would be even greater. *Id.*

Recognizing the harshness of his position, the Trustee proposed in his 1979 Plan of Reorganization that the reorganization court authorize him to establish a labor protection settlement program with a fund of $50 million to make "*prompt* and *certain* payment of a smaller amount of money than would otherwise be the case" if his position on deferral were rejected. *1979 Plan of Reorg.*, at 52 (emphasis in original). "Such an arrangement[,]" the Trustee asserted, "would better meet the real needs of employees for protection at the time of the loss of jobs, while providing an increased return to other creditors and shareholders." *Id.* That proposal was never acted upon by either the court or the ICC because of the passage of the MRRA.

B. Congress' Response To The MILW Crises

When Congress began to address the MILW's restructuring problems in the fall of 1979, it addressed, among other items, the issues

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[3] Due to a number of factors, including early retirements and a high attrition rate for a time period, the impact on employment has not been as great as first anticipated. 2,218 employees have made claims against the estate for work force reductions, and it is estimated that an additional 1,000 employees might still be affected. *Trustee's Revised Plan of Reorganization*, [hereinafter, "*1981 Revised Plan*"], dated September 15, 1981, at 17.

raised by the Trustee to effect a quick and successful reorganization under existing laws. First, as the congressional debates show, Congress was well aware of the position of the Trustee urging a deferral of needed protections, and of labor's opposition. *See*, Appendix C-3 at 66a. By Sections 9 and 15 of the MRRA, 45 U.S.C. § 908, 914, Congress required the Trustee and labor to work out an arrangement whereby employees affected by the restructuring would be assured of some form of "prompt and certain" monetary protections. Congress, however, did not resolve the legal dispute between the Trustee and labor over the claim of the Trustee that traditional benefits could be deferred, but rather, provided in Section 13 of the Act, 45 U.S.C. § 912, that the individual employees were to have an option to elect between benefits provided under certain employee protective provisions of the Act, including Section 9, or those traditionally imposed under the Interstate Commerce Act or by contract. Also, in Section 5(c), it expressly provided that: "Nothing in this section shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this Act." 45 U.S.C. § 904(c).

Congress also addressed the problems presented by the need of the Trustee to seek ICC approval for certain restructurings, and it provided in Section 5 of the Act procedures which would expedite, after a certain time period,[4] abandonments, sales, and transfers of MILW lines and facilities. In Section 5(a), Congress transferred from the ICC to the reorganization court the jurisdiction to authorize abandonments of MILW lines, and in Section 5(b), the court was given authority both to control the time in which the ICC considered sale or transfer cases involving lines to be used in continued rail operations, and to authorize such a sale or transfer once the ICC approved the transaction. Once again Congress was aware of the need to protect

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[4] No abandonments or sales were to take place until April 1, 1980, or until the occurrence of an event described in Section 22(b) of the Act, 45 U.S.C. § 920(b). Such an event occurred on December 31, 1979, when the ICC concluded that a proposed employee-shipper ownership plan was not feasible.

employees, and it provided in Section 5(a)(1), with respect to abandonments, that:

> In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under . . . [49 U.S.C. § 11347].

45 U.S.C. § 904(a)(1). A similar qualification was placed upon the court's authority to approve any sale or transfer of MILW lines "to be used in continued rail operations," for Section 5(b)(1) provides that in approving any such sale or transfer, "the court shall provide a fair arrangement at least as protective of the interest of employees as that required under" 49 U.S.C. § 11347. 45 U.S.C. § 904(b)(1). As Congress explained in its Conference Report:

> The Conferees intend that the granting of authority to the Bankruptcy Court to order sales and abandonments not change existing law with respect to employee protection. The employees' right to protection shall be required by the Court to the same extent that it would have been provided by the Interstate Commerce Commission under Section 11347 of the Interstate Commerce Act. Nothing in this section shall be deemed to affect the priorities or timing of payment of employment protection which might have existed in the absence of this section.

H. Rpt. No. 96-583, 96th Cong., 1st Sess. at 17 (1979).[5]

C. Employee Protection Under The MRRA

Shortly after the MRRA was enacted on November 4, 1979, the Trustee began to use Section 5 of that Act to expedite the processing

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[5] Besides addressing the two issues referred to in the text, Congress also provided in the MRRA funding for continued MILW operations over the entire system while the feasibility of an employee-shipper ownership plan was examined, and for a sixty (60) day period thereafter. MRRA §§ 6, 7, 45 U.S.C. § 662, 905, 906. It further included in Sections 8, 10, 11 and 12 of the Act, 45 U.S.C. § 907, 909, 910, 911, provisions intended to give dismissed MILW employees priority of hiring rights, supplementary unemployment insurance and retraining assistance. Section 17 of the Act, 45 U.S.C. § 915, extended the provisions of Section 5 to all other pending Section 77 reorganizations.

of pending abandonment and sale applications. Acting upon the Trustee's request, the reorganization court set deadlines for the ICC to file its advisory reports on pending abandonment applications, and set those cases for a hearing within days after the reports were scheduled to be received. Order No. 248, entered November 26, 1979. Initially viewing Section 5(b) of the Act as applying to any "sale or transfer of a line of the Milwaukee Railroad to be used in continued rail operations" (45 U.S.C. § 904(b)(1)), the Trustee asked the reorganization court in December 1979 to approve on a preliminary basis under Section 5(b)(3) of the MRRA, the sale to a newly formed railroad, the Seattle & North Coast Railroad Company [hereinafter, "S&NC"], of a branch line of the MILW which he proposed to abandon. Response of Trustee dated December 14, 1979. That preliminary approval was granted on January 4, 1980, in part because continued service over the line to be sold was "essential" to local shippers on that line. Order No. 274A, Appendix D-1 at 78a. In January 1980, the Trustee agreed to sell to the State of Wisconsin under Section 5(b) certain rail lines which he had proposed be abandoned, but which the State considered to be essential to its economy. Motion of State of Wisconsin Concerning Sale, dated January 9, 1980. On January 21, 1980, the reorganization court approved the State of Wisconsin's offer and, "pursuant to Section 5(b)(2)" of the MRRA, instructed the ICC to act on the State's January 11, 1980 acquisition application by February 1, 1980. Order No. 281, entered January 23, 1980. By a decision served February 1, 1980, the ICC approved the State's acquisition application under Section 5(b)(2) of the MRRA. Appendix F-4 at 107a.

While the Trustee was processing preliminarily his various requests to abandon and to sell MILW lines, he and rail labor were attempting to define the levels of protection for employees required by Sections 5 and 9 of the MRRA. On December 14, 1979, the Trustee and the rail labor organizations entered into an agreement under Section 9 of the MRRA which provided benefits for MILW employees essentially as enunciated in the Conference Report to the MRRA (*i.e.*, H. Rpt. No. 96-583, *supra* at 20-23), with a maximum liability to the estate of $75 million. On February 7, 1980, the reorganization court both approved that Section 9 Agreement and the

borrowing of $75 million under Section 15 of the MRRA, 45 U.S.C. § 914, to fund those protections. Order No. 286. While that Agreement was pending court approval, the court appointed a special master to consider the pending abandonment requests under Section 5 of the MRRA (*e.g.*, Order No. 276, entered January 4, 1980); the issue of the employee protection required by Section 5(a)(1) was one of the main issues presented by those pending abandonment applications.

Prior to the issuance of the special master's report, the ICC served its report and recommendations in the lines west abandonment case, and recommended that:

> Conditions for the protection of employees should be imposed as set forth in *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), except that the base period for computing displacement and dismissal allowances . . . should be the last 12 months in which the employee performed compensated service for more than 50 percent of each such month (as opposed to the last 12 calendar months) prior to displacement or dismissal.

Lines West Abandonment Report at 97, Appendix E-4 at 103a. The ICC, however, refused to address "questions respecting the cost or priority of the required protective arrangement; [according to the ICC] those matters are more appropriately addressed in the pending reorganization proceeding." *Id.* at 91, Appendix E-4 at 102a. Those matters were addressed by the special master in a report which he issued on February 20, 1980, recommending that eighteen (18) pending abandonment applications for MILW branch lines be granted. Appendix C-3 at 59a-76a.

In his report, the special master addressed the issue of the levels of employee protection mandated by Section 5(a)(1) of the MRRA, and stated that :

> [He] . . . agrees with RLEA that Section 5 of the MRRA requires the imposition of protective conditions for employees at the time of court approval of an abandonment under that Section. He disagrees, however, with RLEA's contention that payments pursuant to that protection must be made as liability accrues . . . .

> The conclusion that the Milwaukee need not pay labor protection as it accrues rests on three independent grounds. A holding that immediate payment is required would be contrary to the Congressional scheme for reorganization of the Milwaukee established by the MRRA, might preclude the reorganization of the Milwaukee and thereby frustrate the purposes of Section 77 of the Bankruptcy Act, and would require a premature determination of the priority of the Milwaukee's labor protection obligations. Each of these considerations dictates that payment of labor protection claims await final consumation [*sic*] of a reorganization plan.

Appendix C-3 at 63a. [6]

RLEA and the indenture trustees [7] filed objections to the special master's report on the issue of employee protection, but for different reasons. RLEA asserted that employee protection under Section 5(a)(1) to the MRRA could not be deferred, whereas the indenture trustees argued that the court should reserve ruling on employee protection until, at the earliest, the ICC had rendered its decision on

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[6] A second issue regarding the MRRA's employee protection requirements which was addressed by the special master, and by the courts below, was whether Section 5(a)(1) mandated that a protective provision be imposed which prohibited any change in MILW operations until after an implementing agreement was negotiated or arbitrated. Such a condition was found by the United States Court of Appeals for the Second Circuit to be a "baseline" level of protection required by 49 U.S.C. § 11347. *New York Dock Ry.* v. *United States*, 609 F.2d 83, 94-95 (2d Cir. 1979). The special master and the courts below, however, concluded that such a requirement was not demanded by Section 5 of the MRRA. Appendix B at 2a-10a. While RLEA disagrees with that conclusion, it is not asking this Court to review that issue due to the particular circumstances in which this issue arose in this case. On February 29, 1980, the reorganization court authorized a second embargo over the lines to be abandoned before the abandonments were actually authorized by the orders at bar (Order No. 290A, dated February 25, 1980), thus giving the Trustee an independent basis to suspend operations over those lines.

[7] The indenture trustees are respondents Harris Trust and Savings Bank, the First National Bank of Chicago, and the Girard Bank.

the pending reorganization proposals. The reorganization court rejected both positions. As the reorganization court stated:

> The position taken by the indenture trustees conflicts with the express language of Section 5(a)(1) of the M.R.R.A., which mandates that the court require the carrier to provide a "fair arrangement" for labor protection in authorizing any abandonment pursuant to this section. Although the labor protection settlement agreement approved in Order No. 286 will provide immediately available benefits, affected employees are entitled to make an informed choice between their benefits under that agreement and those required by § 11347 of Title 49.
>
> On the other hand, the history of this proceeding refutes R.L.E.A.'s contention that any labor protection benefits must actually be paid commencing with abandonment. If this were made a precondition to the approval of abandonment petitions under Section 5(a)(1), it would cripple or perhaps destroy the debtor's financial ability to continue operations. Congress' language requires only an "arrangement," not a payment which would result in favoring the earliest claimants to the detriment of all other interests.

Appendix C-1 at 54a.

Accordingly, when the reorganization court authorized the pending abandonment request on February 29, 1980, it imposed protective conditions to protect employee interests, but authorized the Trustee to defer payment of those protective benefits. The court expressly reserved "jurisdiction to determine the priority for paying claims under . . . [the imposed protective conditions] at a future date and to determine the rights of employees covered by [those conditions] . . . in the event of changed conditions in the consummation of the reorganization proceedings." Appendix C-2 at 57a-58a. RLEA filed a notice of appeal from that decision on March 10, 1980, and then on April 17, 1980, from the April 2, 1980 decisions in the lines west abandonment proceedings which resulted in a similar deferral order. Appendices E-1 at 88a, and E-2 at 91a.

While the MILW Reorganization Court was considering the deferral issue, it was also faced with the question of whether Section 5(b)(1) of the MRRA required that it impose an employee protective arrangement in a sale or transfer case that imposed certain obligations upon the acquiring entities. RLEA had argued in the S&NC sale

proceeding, and in the other pending sale cases, that Section 5(b)(1) of the MRRA, by its direct reference to 49 U.S.C. § 11347, and by its indirect reference to 45 U.S.C. § 565(b), required the reorganization court to impose a protective arrangement which (1) directed the new operator of the line to negotiate with MILW employee representatives over the selection of forces to operate the line, (2) required the new operators to give priority of hire to dismissed MILW employees, and (3) mandated that the collective bargaining rights and agreements of the MILW employees be preserved until changed under the provisions of the Railway Labor Act, 45 U.S.C. § 151, *et seq*. Response of RLEA dated December 20, 1979, to Trustee's Application to Sell Port Angeles Line, at 5-10. The Trustee and the prospective purchasers of those MILW lines opposed RLEA's contention primarily upon the argument that, if imposed, the conditions asserted by RLEA to be required by Section 5(b)(1) of the MRRA would make the MILW lines being discarded by the Trustee unattractive to prospective purchasers. However, no evidence was introduced by those objectors to support those conclusory statements.

On the same day that it concluded that Section 5(a)(1) employee protective benefits must be deferred, the reorganization court also rejected RLEA's assertion that Section 5(b)(1) of the MRRA required buyers of MILW lines for continued rail operations to comply with the employee protective provisions mandated by that section. According to the reorganization court, the abandonment provisions of Section 5(a), and not the sale or transfer provision of the MRRA, governed the sale transactions before that court "since the bankrupt railroad does not simply abandon its abandonments." Order No. 297, Appendix D-2 at 82a.

Under prior law, as the reorganization court viewed it, a sale of MILW lines to a newly formed railroad or to another non-carrier was governed by 49 U.S.C. § 10901, while a sale to an existing carrier was within the scope of 49 U.S.C. § 11343. *Id*. at 83a. Since the ICC believed that employee protection in a Section 10901 case was discretionary, Section 5(b)(1)'s mandatory provisions could not be viewed as applying to such a sale lest the MRRA be viewed as changing existing law with respect to employee protection. *Id*. at 82a-83a. Such a result, the court reasoned, would be inconsistent

with the legislative history of the MRRA, and thus, the court concluded that Section 5(b) applied to the usual transactions between carriers, while Section 5(a) applied to "abandonments" which were followed immediately by sales to non-carriers to assure continued rail operations. Since the employee protection required by Section 5(a)(1), according to the court, protected against effects caused by the abandonment, that section did not require non-carrier purchasers to comply with the employee protective provisions. *Id.* at 83a. RLEA noted an appeal from those orders of February 29, 1980, on March 10, 1980.

On February 19, 1980, and again on March 10, 1980, the reorganization court authorized the "abandonment and sale" of MILW lines in Wisconsin which the ICC had previously authorized the State of Wisconsin to acquire under Section 5(b)(2) of the MRRA. In authorizing the transactions, the court ordered that: "Employees affected by these transactions shall receive protection as required by law from the Estate of the Milwaukee Road, and the State of Wisconsin shall have no liability in connection therewith." Order No. 281A and No. 281B at Para. 2, Appendices F-1 at 104a, F-2 at 105a. RLEA asked that court to reconsider those orders, but on March 27, 1980, the court relied upon its earlier ruling that Section 5(a) governed such abandonment-sales and rejected RLEA's request. Order No. 281C, Appendix F-3 at 106a. RLEA noted an appeal from the Wisconsin sale orders on April 17, 1980.

D. The Court Of Appeals' Decision

All four of RLEA's appeals were consolidated for briefing and argument by the court of appeals, and on August 17, 1981, that court issued its decision affirming all of the orders from which those appeals had been taken.

When it addressed the deferral issue, the appellate court concluded for three separate yet interrelated reasons that "the trustee's payment of traditional labor protection benefits must await final consummation of the Milwaukee reorganization." Appendix B at 11a. First, according to the court of appeals, its review of the MRRA and its legislative history compelled it to conclude that Congress, notwithstanding Section 5(c) of the Act (*see*, Appendix B at 14a n.13),

intended that employee protection benefits under Section 5 not be treated as an administrative expense, and that the payment of those benefits be deferred.[8] Second, in the court's opinion concepts of fairness to other creditors, especially in light of the alternative benefits available under Section 9, led to the conclusion that benefit payments under Section 5 must be deferred.[9] After noting that a final determination of the priority to be given to benefits under Section 5 must wait until the reorganization plan is finalized due to an earlier ruling on the characterization of such claims, the court stated:

> Moreover, acceptance of RLEA's position that traditional benefits are currently payable as accrued would result in the reorganization court placing in priority one set of claims against the estate over all other equally significant claims. This occurrence would result in subordination of other claims in favor of the employees' claims. Such an unfair result simply cannot stand.

Appendix B at 25a. And finally, the court concluded that the reorganization court had the discretionary authority under Section 77 to defer the payment of traditional protective benefits in order "to maintain the status quo of the debtor pending plan consummation." *Id.* at 30a. That discretion was not abused in this case, the court found, since any "premature benefit payment would also serve to

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[8] Observing that Congress expressly made Section 9 benefits an administrative expense, the court concluded that the absence of a similar provision in Section 5 indicated that Congress intended benefits under that section not be classified as an administrative expense. Appendix B at 15a-16a; *but see*, 45 U.S.C. § 904(c). Moreover, in the court's view it was necessary to construe Section 5 benefits as being deferrable in order to insure that the optional scheme of the Act was not rendered inoperative by all employees electing the traditional benefits over the compromise provisions. *Id.* at 17a-19a.

[9] In reaching that conclusion, the court rejected the reasoning of cases decided under Section 64(a)(1) of the Bankruptcy Act, 11 U.S.C. § 104(a)(1), because they did not adequately consider the "fairness" concept applicable to Section 77 proceedings.

render the optional protective scheme within the MRRA meaningless." *Id.* at 31a. [10]

The need to assure the fruition of what it perceived to be the policy considerations behind Section 5 of the MRRA also entered heavily into the appellate court's consideration of the issues raised by RLEA's appeals from the abandonment-sale orders. Relying upon Section 5(c)'s command that "[n]othing in this section shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this Act[,]" the court believed that its task in those appeals was "to ascertain which party, under existing law aside from the MRRA, is to bear the expense of labor protection upon the occurrence of line abandonment and subsequent acquisition by a non-carrier." Appendix B at 37a. (footnote omitted). Based upon its view of prior law as construed by the ICC, [11] the court held that the transactions at issue were abandonments governed by Section 5(a) of the MRRA, rather than sales under Section 5(b). Section 5(b), the court believed, was applicable only to sales between the MILW and an existing carrier. *Id.* at 42a-43a. That conclusion, the court opined, was not only consistent with the language of the statute, [12] but also was compelled by the statute's policy.

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[10] Following the rationale of the Third Circuit in *In re Penn Central Transp. Co.*, 452 F.2d 1107, 1109 (3rd Cir. 1971), *cert. denied*, 406 U.S. 944 (1972), the appellate court observed that the reorganization court evidenced a "keen awareness . . . of its continuing duty to reassess the progress of the Milwaukee reorganization and to order the trustee to pay traditional benefits at the earliest feasible date." Appendix B at 31a. However, in the very next set of paragraphs, the appellate court concluded that "fairness to all creditors and employees" required traditional employee benefits to be deferred until "if and when the reorganization is completed." *Id.* at 32a.

[11] RLEA had argued that prior law as relied upon by the lower court was irrelevant because it was premised upon decisions which, in effect, were overruled by the 1976 amendments to the Interstate Commerce Act. Pub. L. No. 94-210, §§ 402(a), 802, 49 U.S.C. §§ 10903(b) (2), 11347. The appellate court dismissed that argument by stating that it need not be decided. Appendix B at 39a n.47.

[12] The court noted, for example, that because Congress used the term "purchasing carrier" in Section 5(b) (3), Section 5(b) in toto could not be construed as applying to non-carriers, as RLEA argued. Appendix B at 43a.

Section 5(a)(1) commands that the reorganization court, when it authorizes any abandonment, shall require "the carrier" to provide an arrangement to protect employees. Since the transactions at bar, according to the appellate court, involved abandonments insofar as the MILW was concerned, "it is clear that the Section 5(a) abandonment procedure is in effect and not that utilized for a sale or transfer." Appendix B at 43a. [13] As the court had earlier reasoned:

> It is the carrier's cessation of operations, not the non-carrier vendee's acquisition which adversely affects the employees. . . . Here, the abandoning carrier itself reaps the significant benefit in the form of savings realized by the discontinuance of uneconomic and cumbersome rail service, and is therefore the primary beneficiary when relieved of its duty and costs of operations. . . . No related benefit is discernable which flows to the acquiring non-carriers as a result of the Milwaukee abandonments at issue. Therefore, there is no justification in imposing such a cumbersome and potentially devastating burden upon them.

Appendix B at 41a.

RLEA had argued throughout the sale proceedings below that the levels of employee protection required by 49 U.S.C. § 11347 through Section 5 of the MRRA mandated that the arrangement imposed to protect MILW employees include, among others, provisions to accomplish the specific objectives of 45 U.S.C. §§ 565(b)(1), (2) and (4); namely:

> (1)[T]he preservation of rights, privileges, and benefits . . . to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; [and] . . . (4) assurances of priority of reemployment of employees terminated or laid off . . . .

In order to make those provisions meaningful, RLEA's argument continued, the obligation to provide such protections must also be imposed on the acquiring entities or their designated operators. That

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[13] In reaching such a conclusion, the court did not address those ICC decisions which held Section 10901's predecessor applicable to sales of lines being abandoned to existing carriers as well. *E.g., Okmulgee N. Ry. — Abandonment*, 320 I.C.C. 637 (1964).

argument was rejected by the appellate court because of policy reasons (Appendix B at 49a-50a) and because, in the court's opinion, it was contrary to national labor policy. Relying upon this Court's decision in *Howard Johnson Co., Inc.* v. *Detroit Local Joint Executive Bd.*, 417 U.S. 249 (1974), among others, the court stated that:

> [A]bsent a near identity of employers and perfect continuity of a single enterprise, a court may not impose the substantive provisions of a collective bargaining agreement between a union and the predecessor employer upon a nonconsenting successor employer.

Appendix B at 47a. Since those elements did not exist in this case, [14] the appellate court reasoned, the court below properly declined to impose such a condition.

Although it recognized that Congress may by statute require such a carryover of collective bargaining rights and obligations, the appellate court concluded that evidence of such a congressional intent "is totally lacking within the MRRA or other pertinent statutes." Appendix B at 50a. Oddly enough, that statement was made in the same paragraph in which the court cited 45 U.S.C. § 565 (*i.e.*, the statutory benchmark incorporated into Section 5 of the MRRA by 49 U.S.C. § 11347) as an example of a statute where "Congress has occasionally evinced a desire to bind new operators to existing bargaining agreements of their employees." Appendix B at 50a.

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[14] One factor relied upon by the court to conclude that the acquiring entities were not successor carriers under federal labor law was the fact that "a low percentage of the former Milwaukee employees are employed with the new operators." Appendix B at 48a. Ironically, that is one of the violations about which RLEA has been complaining.

REASONS FOR GRANTING THE WRIT

I. In Holding That The Reorganizaton Court Had Properly Deferred Employee Benefits Under Section 5 Of The MRRA, The Court Of Appeals Has Decided In A Manner Contrary To Both The Clear Language Of The MRRA And Prior Decisions Of This Court An Issue Which Is Important To The Orderly Administration Of The Railroad Reorganization Statutes

Congress and this Court have long recognized that the railroad employee is an essential part of our national rail transportation system. *E.g.*, *United States* v. *Lowden*, 308 U.S. 225, 235-37 (1939). Moreover, Congress and this court have acknowledged that there is a strong public interest in guaranteeing the "stability of the labor supply available to railroads" (*ICC* v. *Railway Labor Executives' Assoc.*, 315 U.S. 373, 377 (1942)), and consequently, for almost fifty (50) years Congress has taken steps to assure that stability by shielding railroad workers from bearing unaided the harsh economic consequences of measures which their employers might take to economize through restructuring their rail systems. *E.g.*, Section 7, Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 213-14; Section 106, Rock Island Transition And Employee Assistance Act, 45 U.S.C. § 1005. Those steps have never been rejected by this court, for as this court has explained:

> One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation [and as added by later statutes, rail restructuring], has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.

United States v. *Lowden*, *supra*, 308 U.S. at 234. By the time the MILW filed its latest petition for reorganization in 1977, Congress had directed that a railroad (even one in reorganization) provide a fair arrangement to protect the interests of employees *before* that rail carrier abandon or sell any of its lines. *See*, 49 U.S.C. §§ 10903(b)(2), 11347. It is the enforcement of that command which is at issue in this case, for the Trustee and the creditors have invoked the powers of the reorganization court to evade those statutorily imposed obligations to protect employees.

RLEA respectfully submits that the deferral issue presented by this case raises a substantial question of federal law which is important to the orderly administration of the railroad reorganization statutes—*i.e.*, Section 77 of the Bankruptcy Act, 11 U.S.C. § 205, and Subchapter IV of Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1161, *et seq*. While it is correct that Section 5 of the MRRA applies solely to the MILW reorganization, the language used in Section 5 is virtually identical to that added by Congress to the abandonment and sale provisions of the Bankruptcy Code, 11 U.S.C. §§ 1170, 1172(b), by Section 227 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, 1931.[15] Moreover, even though the court of appeals' decision does contain some language limiting its applicability to the MILW situation (Appendix B at 13a-14a), the court's statements and rationale on the powers of a reorganization court clearly apply to all railroad reorganization proceedings. *See*, Appendix B at 27a n.27. Consequently, this decision will obviously be used by opponents of employee protection in railroad reorganization proceedings to urge a deferral of traditional benefits even though an alternative employee protective program might not be available.

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[15] Section 227 of the Staggers Rail Act provides as follows:

> (a) Section 1170 of title 11, United States Code, is amended by adding at the end thereof the following new subsection:
>
> "(e)(1) In authorizing any abandonment of a railroad line under this section, the court shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees as that established under section 11347 of title 49.
>
> "(2) Nothing in this subsection shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this subsection.".
>
> (b) Section 1172 of title 11, United States Code, is amended by adding at the end thereof the following new subsection:
>
> "(c)(1) In approving an application under subsection (b) of this section, the Commission shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees as that established under section 11347 of title 49.
>
> "(2) Nothing in this subsection shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this subsection.".

Employee protection has been imposed before in cases in which the carrier has been in reorganization under Section 77 (*e.g.*, *United States* v. *Lowden, supra; Central R. of N.J.—Abandonment*, 342 I.C.C. 227 (1972)), but until this case, no court or administrative agency has ever permitted the payment of such benefits to be deferred. An argument for deferral was made in the Penn Central Reorganization proceeding but was rejected by the ICC because the Commission concluded that the "social considerations" which indicated that displaced employees needed cash, and not a deferred promise to pay, were "of the paramount importance." *Penn Central Transportation Co.—Reorganization*, 347 I.C.C. 45, 92 (1973). As the ICC added: "We believe that some form of immediate dollar income for displaced employees is essential and we cannot endorse the substitution of junior securities therefore." *Id.* Unfortunately, the holding of the court of appeals on the deferral issue once again opens the door for assertions that while Sections 5 and 17 of the MRRA, and now 11 U.S.C. §§1170(e) and 1172(c), require the *imposition* of a protective arrangement, the reorganization court has the power *to defer those payments* past the time when they are needed by the employees.

This issue is all the more troublesome to railroad employees because the court of appeals' decision virtually ignores the plain language of Section 5(c) of the MRRA, and the clear intent of the MRRA not to legislate a decision on the Trustee's deferral argument. [16] That language and intent were ignored in order to reach a result which the court believed comported with an intent of Congress to require employees "to elect" the Section 9 benefits. The Conference Report shows that Congress had no such intent. H. Rpt. 96-583, *supra*, at 17, 20, 25. Moreover, to support its deferral conclusion, the court of appeals had to adopt as part of its reasoning the position urged by the dissent in *Reading Co.* v. *Brown*, 391 U.S. 471 (1968), and to expand past its four corners the decision of this court in *Continental*

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[16] That Congress did not intend to adopt the Trustee's deferral position is evident from the fact that Congress gave the employees the right to select either Section 9 or Section 5 benefits (MRRA § 13, 45 U.S.C. § 912), and did not simply repeal the applicability of traditional employee protection to this case.

Illinois National Bank v. *Chicago, Rock Island & Pacific Ry.*, 294 U.S. 648 (1935).

In the case at bar, the court of appeals concluded that the traditional benefits under Section 5 of the MRRA should not be accorded priority because the court could not discern any benefit to the Trustee in preserving the estate if such payments were required to be made. Appendix B at 23a n.24, 26a-27a. Moreover, the appellate court believed that it would be unfair to other creditors to allow a large claim such as that under Section 5 to have priority. *Id.* at 25a. But in advancing those reasons, the court of appeals ignored the fact that under prior law the obligation to protect employees was an obligation incurred by the Trustee since it was the trustee who was relieved of his obligation to provide rail service. 49 U.S.C. § 10102(16) and (18). Section 5 of the MRRA, RLEA submits, did not change that fact. Section 5(c), 45 U.S.C. § 904(c). Consequently, as this court concluded in *Reading Co.* v. *Brown, supra,* an obligation of the Trustee, incurred while operating the debtor's business, is an administrative expense. 391 U.S. at 482-83. Furthermore, this court in *Brown* expressly rejected the notions adopted by the appellate court in this case that to be an administrative expense an expense had to aid the rehabilitation of the debtor, and could not be of such a magnitude as to exclude all other creditors from participating in the distribution of assets. *Id.* It was the *Brown* dissent which unsuccessfully urged those limitations on the administrative expense classification. 391 U.S. at 485-91 (Warren, C.J., dissenting).

To support its assertion that a railroad reorganization court has the discretionary authority to defer the payment of "valid claims upon the estate's assets, *including* those having priority" (Appendix B at 27a, emphasis in original), the appellate court relied upon this court's decision in *Continental Illinois National Bank* v. *Chicago, R.I.&P.Ry., supra*. That decision, however, does not by its own facts go as far as the appellate court opined, for the claims involved in that case were pre-petition claims. Moreover, in the sole appellate court decision prior to the one at bar where an administrative expense was expressly permitted to be deferred, the court permitted such a deferral with the caveat that it cease as soon as possible. *In re Penn Central Transportation Co.*, 452 F.2d 1107, 1109 (3rd Cir. 1971), *cert.*

denied, 406 U.S. 944 (1972). While the court in this case reiterated that caveat at one point (Appendix B at 31a), it went on to add that fairness to all required that the deferral in this case last until the MILW reorganization was completed. *Id.* at 32a. That holding means that a railroad reorganization court can defer the payment of such operating expenses as vacation pay, pension benefits, personal judgments, and other similar charges. *Id.* at 28a n.31. Petitioner RLEA respectfully submits that if *Continental Illinois National Bank* can be stretched that far, it should be this court, and not the court of appeals which makes that decision.

This case, petitioner RLEA submits, is a very good vehicle for this court to determine whether a railroad reorganization court has the power to defer the payment of traditional employee protective benefits. Even though RLEA has disputed his estimates, the Trustee originally estimated that traditional "labor protection claims would be in the vicinity of $325 million." *1979 Plan of Reorg.*, at 51. Since the MRRA has been in effect, 2,218 claims have been made for employee protection; by September 1, 1981, $35 million had been paid to the 1,852 employees who elected benefits under the optional benefit plan of Section 9 of the MRRA, while only 74 employees elected to receive benefits under Section 5 of that Act. *1981 Revised Plan*, at 17. Thus, at the present time, the potential liability to the estate if RLEA's position is sustained would be, according to the Trustee's own estimates, only $4.7 million. *Id.* Most of the restructuring has been completed, and consequently a determination of the legal issues presented by the deferral question can now be made without being influenced by predictions of doom to the MILW if RLEA's position is sustained. [17]

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[17] The Trustee estimates that an additional 1,000 employees will still be affected by subsequent restructurings, and that if those employees elected Section 5 benefits, the potential liability would be approximately $100 million. *1981 Revised Plan*, at 17. Most of those reductions, however, are expected to be from a potential sale and from non-abandonment related train crew reductions.

II. The Decision Of The Court Of Appeals To Relieve Newly Formed Railroads And Other Designated Operators Of The Responsibility To Comply With The Employee Protective Conditions Mandated By Section 5 Of The MRRA, Presents Issues Which Have Not Been Decided By This Court But Which Are Important To An Orderly Administration Of Federal Statutes Regulating Railroad Abandonments And Sales

In 1976 Congress amended both the abandonment and the consolidation sections of the Interstate Commerce Act, 49 U.S.C. §§ 1a and 5(2) (since recodified as 49 U.S.C. §§ 10903, 11343), to require that whenever the ICC approved any transaction under those sections, the Commission impose as a condition of that approval a fair and equitable employee protective arrangement containing provisions that "shall be at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this Act [49 U.S.C. § 11347] and pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565)." Section 802, Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, codified as 49 U.S.C. § 10903(b)(2); *see also*, Section 402(a), amending 49 U.S.C. § 5(2)(f), since recodified as 49 U.S.C. § 11347. Those amended provisions of the Interstate Commerce Act required the ICC to revise its employee protective formulae to incorporate into its protective arrangement those levels of protection which were imposed pursuant to Section 405 of the Rail Passenger Service Act [hereinafter, "RPSA"], 45 U.S.C. § 565. [18]

Section 405(b) of the RPSA required that the arrangement promulgated pursuant to that section contain provisions which "may be necessary" to accomplish, among other objectives:

> (1) [T]he preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights;

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[18] In 1979 the ICC promulgated those new arrangements in *Oregon Short Line R.—Abandonment*, 360 I.C.C. 91 (1979), and *New York Dock Ry.—Control*, 360 I.C.C. 60 (1979), *aff'd, New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). In 1980 the ICC promulgated a third arrangement for lease and trackage right cases. *See*, Appendix B at 3a.

> [and] . . . (4) assurances of priority of reemployment of employees terminated or laid off . . . .

45 U.S.C. § 565(b). RLEA respectfully submits that the incorporation of Section 405's levels of protection into the abandonment and sale provisions of the Interstate Commerce Act, along with the previously existing Section 11347 levels, requires that any entity, which acquires and operates a rail line in a transaction to which those conditions are imposed, must be obligated: (1) to negotiate with the representatives of the affected employees to select the forces to perform that work; (2) to assume the existing rates of pay, rules and working conditions until changed in accordance with the Railway Labor Act; and (3) to give priority of hire to affected employees not hired as a result of the selection of forces negotiations. [19] That position is entirely consistent with the language of the statutes, with the language of the conditions promulgated by the ICC, and with the interpretation given to the progenitor of Section 405(b)—*i.e.*, Section 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c). *See generally, Local Div. 714, Amalgamated Transit Union* v. *Greater Portland Transit Dist.*, 589 F.2d 1 (1st Cir. 1978); *Div. 1287, Amalgamated Transit Union* v. *Kansas City Area Transp. Auth.*, 582 F.2d 444, 447 (8th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); *Southern Ry.—Control*, 331 I.C.C. 151 (1967).

RLEA advanced the same argument as to the reach of Section 11347 in the sale cases at bar because both Section 5(a)(1) and Section 5(b)(1) require that the Section 11347 levels of protection be imposed. However, the appellate court rejected that argument because, in its opinion, neither the language of the MRRA nor our national labor policy justified requiring the non-consenting buyers to assume either the employees or the collective bargaining obligations of the MILW. Appendix B at 36a-51a. That decision by the court of appeals is the first appellate court decision on this issue and presents a

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[19] This issue has arisen in one ICC proceeding, besides those involving the MILW. In *Railway Labor Executives' Assoc.* v. *Durango & S.N.G.R.*, 363 I.C.C. 841 (1981), pet. for review pending, 10th Cir. No. 81-1355, the ICC rejected RLEA's position by holding that employee protection in non-carrier acquisition cases under 49 U.S.C. § 10901 was discretionary.

question which is important to the orderly construction of the employee protective provisions not only of Section 5 of the MRRA, but also of Sections 10903(b)(2) and 11347 of the Interstate Commerce Act, and of Sections 1170(e) and 1172(c) of the Bankruptcy Code. This issue is important, RLEA respectfully submits, because both employees and potential non-carrier purchasers of any rail line for continued rail usage must know before the sale occurs whether Section 11347's levels of protection require the acquiring entity to honor the employee protective obligations mandated by those statutes.

Besides presenting a question as to the scope and reach of both Section 11347 and the MRRA's employee protective provisions, the manner in which the courts below decided this issue also presents a substantial question as to the construction of the abandonment and sale provisions of the MRRA. Both the reorganization court and the court of appeals concluded that the sales at bar were not under Section 5(b)'s sale provisions, even though the clear language of the statute supported such a construction. Rather, those courts held that the abandonment provisions of Section 5 were applicable because a railroad does not "abandon its abandonments." Appendix D-2 at 82a.

The problem with this approach to Section 5 of the MRRA [20] is that it eliminates most of the sales of MILW lines for continued rail operations from the expedited provisions of Section 5(b). Moreover, if carried to its logical conclusion, this construction of Section 5 may result in the exclusion of all sales, even those to existing carriers, from the expedited procedures and interim operation provisions of Section 5(b) because the ICC has in the past treated sales of lines being discarded as being abandonment-sales, regardless of whether the acquiring entity is an existing carrier. *Compare, Cadillac & L.C. Ry.—Acquisition and Operation*, 320 I.C.C. 617 (1964), *with, Okmulgee N. Ry.—Abandonment*, 320 I.C.C. 637 (1964).

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[20] While there are differences in wording between Section 5(b) of the MRRA and Section 1172(b) of the Bankruptcy Code, the conclusion that Section 5(a) is the appropriate provision under which to treat abandonment-sales, may also lead to the conclusion that similar abandonment-sales under the Bankruptcy Code are to be treated under Section 1170 of that Code.

RLEA respectfully submits that the issues presented by the court of appeals construction of Sections 5(a) and (b) are important to the subsequent restructuring of the MILW. More sales are being contemplated, including one which may involve the sale of the entire line. It is important that the parties, including labor, know before those sales are acted upon whether they will be within the scope of Section 5(a), or of Section 5(b), since each provision calls for different procedural steps. Under one, Section 5(a), the court has no control over the ICC's consideration of the acquisition and operation application, whereas it does have such control under Section 5(b). Moreover, one provision, Section 5(b)(3), requires the use of MILW employees, whereas the other has been interpreted by the court of appeals to permit those employees to remain unemployed while others work their former assignments.

CONCLUSION

For the reasons set forth herein, petitioner RLEA respectfully requests that a writ of certiorari be issued to review and to reverse the judgment and opinion of the Seventh Circuit.

Respectfully Submitted,

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Date: January 4, 1982

APPENDIX

APPENDIX A

Statutes Involved

1. Section 5, Milwaukee Railroad Restructuring Act, 45 U.S.C. § 904

Court Approved Abandonments And Sales

Sec. 5.(a)(1) Upon the occurrence of an event described in section 22(b) of this Act, or on April 1, 1980, whichever first occurs, the bankruptcy court may authorize the abandonment of lines of the Milwaukee Railroad pursuant to section 1170 of title 11 of the United States Code. Pending the expiration of the time for appeal of an abandonment order or the determination of any such appeal, the bankruptcy court may authorize the termination of service on a line to be abandoned, and the order authorizing such termination may not be stayed. In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49 of the United States Code.

(2) Prior to the date specified in paragraph (1) of this subsection, the bankruptcy court may hear and consider any request for the abandonment of lines of the Milwaukee Railroad, and may fix the time for the Commission's report on the request, but it may take final action authorizing such abandonment only in accordance with such paragraph(1).

(b)(1) Upon the occurrence of an event described in section 22(b) of this Act, or on April 1, 1980, whichever first occurs, the bankruptcy court may authorize the sale or transfer of a line of the Milwaukee Railroad to be used in continued rail operations, subject to the approval of the Commission under paragraph (2) of this subsection. In authorizing any such sale or transfer, the court shall provide a fair arrangement at least as protective of the interest of employees as that required under section 11347 of title 49 of the United States Code.

(2) The bankruptcy court may not authorize a sale or transfer pursuant to paragraph (1) of this subsection unless an appropriate application with respect to such sale or transfer is initiated with the Commission and, within such time as the court may fix, not exceed-

ing 180 days, the Commission, with or without a hearing, as the Commission may determine, and with or without modification or condition, approves such application, or does not act on such application. Any action or order of the Commission approving, modifying, conditioning, or disapproving such application is subject to review by the court only under sections 706(2)(A), 706(2)(B), 706(2)(C), and 706(2)(D) of title 5 of the United States Code. An application may be initiated with the Commission prior to the date specified in paragraph (1) of this subsection.

(3) Pending review of an application by the Commission pursuant to paragraph (2) of this subsection, the bankruptcy court may, on a preliminary basis, authorize the sale or transfer of lines of the Milwaukee Railroad to another rail carrier. The court may permit the purchasing carrier to operate interim service as a common carrier over the lines to be purchased, without regard to section 10901 of title 49 of the United States Code. In operating such service, the purchasing carrier shall use employees of the Milwaukee Railroad to the extent necessary for the operation of such service. The bankruptcy court may take final action authorizing any such sale or transfer only in accordance with paragraph (1) of this subsection.

(c) Nothing in this section shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this Act.

2. Section 11347, Interstate Commerce Act, 49 U.S.C. § 11347

§ 11347. Employee protective arrangements in transactions involving rail carriers

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the

affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if any employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

3. Section 405(a), (b) and (c), Rail Passenger Service Act, 45 U.S.C. § 565(a), (b) and (c)

Sec. 405. Protective Arrangements For Employees.

(a) A railroad shall provide fair and equitable arrangements to protect the interests of employees, including employees of terminal companies, affected by a discontinuance of intercity rail passenger service whether occurring before, on, or after January 1, 1975. A "discontinuance of intercity rail passenger service" shall include any discontinuance of service performed by railroad under any facility or service agreement under sections 305 and 402 of this Act pursuant to any modification or termination thereof or an assumption of operations by the Corporation.

(b) Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act. Any contract entered into pursuant to the provisions of this title shall specify the terms and conditions of such protective arrangements. No contract under section 401(a)(1) of this Act between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective

provisions of such contract afford affected employees, including affected terminal employees, fair and equitable protection by the railroad.

(c) Upon commencement of operations in the basic system, the substantive requirements of subsections (a) and (b) of this section shall apply to the Corporation and its employees in order to insure the maintenance of the protective arrangements specified in such subsections, except that nothing in this subsection shall be construed to impose upon the Corporation any obligation of a railroad with respect to any right, privilege, or benefit earned by any employee as a result of prior service performed for such railroad. The Secretary of Labor shall certify that affected employees of the Corporation have been provided fair and equitable protection as required by this section within one hundred and eighty days after assumption of operations by the Corporation.

APPENDIX H

List of RLEA Member Organizations Participating Herein

American Railway Supervisors Association, Division of BRAC
American Train Dispatchers Association
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railway, Airline and Steamship Clerks
Hotel & Restaurant Employees & Bartenders International Union
International Association of Machinists and Aerospace Workers
International Longshoremen's Association
International Organization of Masters, Mates and Pilots
National Marine Engineers Beneficial Association
Railroad Yardmasters of America
Sheet Metal Workers' International Association
Seafarers International Union of North America
Transport Workers Union of America
United Transportation Union

Appendix

81-1250

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

RICHARD B. OGILVIE, Trustee Of The Chicago, Milwaukee, St. Paul & Pacific Railroad Company; STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION; STATE OF SOUTH DAKOTA; PORT OF PEND OREILLE; PEND OREILLE VALLEY RAILROAD COMPANY, INC.; SEATTLE & NORTH COAST RAILROAD COMPANY; FIRST NATIONAL BANK of CHICAGO, as Indenture Trustee; GIRARD BANK, as Indenture Trustee; HARRIS TRUST AND SAVINGS BANK, as Indenture Trustee; and the CHICAGO MILWAUKEE CORPORATION,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

In re Chicago, Milwaukee,
St. Paul & Pacific Railroad Co., 7th Cir.
Nos. 80-1347, 80-1348,
80-1545 AND 80-1546

APPEALS OF
RAILWAY LABOR EXECUTIVES' ASSOCIATION

DECISION DATED AUGUST 17, 1981

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 80-1347, 80-1348, 80-1545 and 80-1546

IN THE MATTER OF: CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Debtor.

CONSOLIDATED APPEALS OF: RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Intervenor.

STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION, STATE OF SOUTH DAKOTA, PORT OF PEND OREILLE, PEND OREILLE VALLEY RAILROAD COMPANY, INC., and SEATTLE AND NORTH COAST RAILROAD COMPANY,

Intervening Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-B-8999—Thomas R. McMillen, *Judge*.

ARGUED DECEMBER 8, 1980—DECIDED AUGUST 17, 1981

Before SPRECHER and WOOD, *Circuit Judges*, and BROWN, *Senior District Judge*.*

WOOD, *Circuit Judge*. In this consolidated appeal, intervenor Railway Labor Executives' Association ("RLEA") presents three distinct but related issues

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* The Honorable Wesley E. Brown, Senior District Judge of the United States District Court for the District of Kansas, is sitting by designation.

concerning the implementation of labor protection conditions to be imposed in the Section 77 reorganization of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company ("Milwaukee"). These appeals involve the propriety of the reorganization court's interpretation of the nature, extent, and timing of employee benefit payments required by Section 5 of the Milwaukee Railroad Restructuring Act ("MRRA"), Pub. L. No. 96-101, 45 U.S.C. § 901 *et seq.* (Supp. III 1979). We affirm.

I.

The first of the three major issues raised by RLEA concerns the adequacy of the level of labor protective conditions imposed upon the Milwaukee by the reorganization court.[1] RLEA argued below that the normal levels of protection—ninety days notice and final negotiation of an implementing agreement—were required by Section 5 of the MRRA. The special master and the reorganization court correctly rejected RLEA's arguments. The modified Appendix B conditions (those adopted by the reorganization court) are as protective as statutorily required, are consistent with both the scheme and language of the MRRA, and are in accord with Interstate Commerce Commission ("ICC") and judicial precedent.

The ICC has developed, over the years, a set of labor protective provisions to be imposed in the usual case of an abandonment, transfer, or sale. The provisions currently require carriers to give ninety days advance notice of an intended transaction and to negotiate an implementing agreement *prior* to the transaction's consummation. *See Oregon Short Line Railroad—Abandonment—Goshen*, 360 I.C.C. 91 (1979) ("*Oregon Short Line III*"); *New York Dock Railroad—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979) ("*New York Dock II*"). The ninety days notice and

[1] This issue is addressed in appeal Nos. 80-1347 and 80-1545. For background on the Milwaukee reorganization, *see In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 611 F.2d 662 (7th Cir. 1979).

prior negotiation provisions represent the minimum levels of employee protection in the *usual* abandonment or 49 U.S.C. § 11343 proceeding.[2] *Id.*; *Mendocino Coast Railway Inc.—Lease and Operate—California Western Railroad*, 360 I.C.C. 653, 654-56, 662 (1980), *petition for review pending sub nom., RLEA v. I.C.C.*, D.C. Cir. Nos. 78-2157 and 80-1274 ("*Mendocino*"); *Seaboard Coast Line Railroad Co.—Abandonment*, 360 I.C.C. 257, 258 (1979). *See* 44 Fed. Reg. 28909 (May 17, 1979). The railroad is precluded from consummating the proposed transaction until such an agreement is effected. *See Oregon Short Line III, supra*, 360 I.C.C. at 91.

Under the scheme recommended by the special master and ultimately approved by the reorganization court, all affected Milwaukee employees are to be protected by the special master's "Appendix B" conditions, which slightly modify the customary levels of protection. Appendix B allows the transaction to be completed after *ten* days notice even if the implementation agreement is not yet negotiated or finalized. However, Appendix B requires that any employee who is injured as a result of completion of a transaction before final negotiation of an implementing agreement must be made whole.

Under Sections 5(a)(1) and 5(b)(1) of the MRRA, 45 U.S.C. §§ 904(a)(1) and 904(b)(1) (Supp. III 1979), the reorganization court must also provide a fair arrangement at least as protective of the interests of employees as that required under 49 U.S.C. § 11347 (1976 and Supp. III 1979). Section 11347 requires the carrier to provide a fair arrangement at least as protective of the interests of employees as the terms imposed under Section 11347 prior to February 5, 1976 (the date the section was amended) as well as those established under Section 405 of the Rail Passenger Service Act of 1970 ("RPSA"), 45 U.S.C. § 565 (1976 and Supp. III 1979).

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[2] For a history of the evolution of these conditions *see generally Oregon Short Line III, supra*, 360 I.C.C. at 91, and *New York Dock Railway v. United States*, 609 F 2d 83 (2d Cir. 1979).

A.

RLEA argues here that the minimum levels apply in all abandonments including those which are the subject of these appeals. Accordingly, RLEA submits that if Section 11347 requires a notice and negotiation provision more protective of the employees' interests than those allowed under Appendix B in order to comply with the requisite minimum levels, then the Appendix B conditions imposed by the reorganization court are defective under Section 5 of the MRRA. It follows, RLEA says, that the court could remove neither the ninety day nor the prior negotiation requirements in its attempt to tailor protection under Section 5(a)(1). Our task therefore is to ascertain the required levels of protection to which Congress was referring when it included, within the MRRA, reference to the provisions imposed under the predecessors to Section 11347 as well as under Section 405 of the RPSA.

RLEA avers that the decision in *New York Dock Railway v. United States*, 609 F.2d 83, 94-95 (2d Cir. 1979), supports its position that a ninety day notice period and final negotiation prior to consummation represent the requisite statutory minimum degree of protection contemplated by Section 11347. However, *New York Dock* was a *normal* case involving the transfer of control between two carriers. The Second Circuit there affirmed the ICC's imposition of employee protective provisions which included the ninety day advance notice requirement and final negotiation of an implementation agreement prior to consummation. The case at bar is anything but normal.

As noted above, the ICC has often fashioned protective conditions designed to fit the unique circumstances of a particular case. The *New York Dock* court recognized this by stating: "[i]t is beyond challenge that within its discretion the ICC may fashion employee protective conditions that are tailored to the special circumstances present in individual cases." *Id.*, 609 F.2d at 91-92. In other words, the statutory minimum levels are "[s]ubject of course to any modifications shown to be needed because of the facts of a particular case." *Oregon Short Line III, supra*, 360 I.C.C. at 97.

Contrary to RLEA's assertions, the statutory minima necessary in the usual abandonment are not required in unusual instances as present here. The Milwaukee is a bankrupt carrier, in a crisis situation, and is subject to embargo orders. In such circumstances, the courts have modified the customary conditions. In total abandonment cases for small railroads, for example, no employee protection has been imposed under 49 U.S.C. § 10903(b)(2) (Supp. III 1979), which contains identical language requiring provisions for labor protection at least as beneficial as established under Section 11347. *See Wellsville, Addison & Galeton Railroad Corp.—Abandonment*, 354 I.C.C. 744 (1978). In cases approving trackage rights and leases under Section 11347, the ICC imposes a twenty day notice period and does not require prior final negotiation of an implementing agreement. *See Mendocino, supra*, 360 I.C.C. at 653; *Norfolk and Western Railway Co.—Trackage Rights—Burlington Northern, Inc.*, 354 I.C.C. 605, 607 (1978).

The ICC, in two recent decisions, has also found alteration of the customary conditions to be proper. In *Oregon Short Line IV*, 360 I.C.C. 666, 674-75 (1980), the ICC found that imposition of *Oregon Short Line III* levels was not required to comply with the similar mandate of 49 U.S.C. § 10903 (Supp. III 1979) which contains identical language to Section 5(a)(1) of the MRRA. The ICC also upheld as adequate, under similar provisions contained in 5(b) of the MRRA, an employee protection agreement negotiated between the trustee, other carriers, and the Milwaukee's unions which provided for only ten days notice and required no final negotiation. *Burlington Northern Inc. Purchase (Portion)—Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 363 I.C.C. 298 (1980).

Section 405 of the RPSA, in addition, which required establishment of protective conditions no less than those found in Section 5(2)(f) (now codified in Section 11347) was held to neither mandate ninety days notice (twenty days notice was allowed) nor final negotiation of an implementing agreement. *Congress of Railway Unions v. Hodgson*, 326 F. Supp. 68 (D.D.C. 1971). There, the court

held that the shortened notice provision was equivalent to traditional ICC prescribed labor protection under the RPSA, and therefore rejected the contention that the failure to require the ninety day notice standard rendered the labor protection inadequate. The court also noted that the prescribed conditions fully protected employees from any adverse effect from consummation of related transactions prior to final negotiation of an implementing agreement, especially in light of a provision there which ensured that all affected employees would be made whole from any injury.

RLEA mistakenly contends that the 1976 amendment to Section 5(2)(f) (now codified at Section 11347) overruled *Hodgson* insofar as its interpretation of the Section is concerned. This is so, RLEA says, because to read *Hodgson* now as representing a valid expression of the minimum levels of protection required by Section 11347 would necessitate reading Congress' subsequent reference to Section 5(2)(f) out of Section 11347. To the contrary, a review of the legislative history of the Section and an evaluation of the Congressional intent behind the Section's amendment, indicates that Congress did not intend to elevate the aspects of any single ICC ruling to a statutory minimum protective level to be utilized in all transactions. If anything, the legislative history of the 1976 amendments to Section 5(2)(f) suggests Congressional ratification of and deference to past ICC practice of formulating individual protective conditions to fit the circumstances.[3]

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[3] The legislative history is silent as to the Congressional intent in amending Section 5(2)(f). However, the Joint Explanatory Statement of the Conference Committee stated that Section 10903(b)(2) of Title 49, which contained identical language to amended Section 5(2)(f):

> [r]equired employee protection no less beneficial than that established under section 5(2)(f) of the Interstate Commerce Act and section 405 of the [RPSA] but without the intention to change the policy and practice of the Commission in connection with certificates involving total termination of service by a railroad company.

S. Rep. No. 94-595, 94th Cong., 2d Sess. 218, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 233.

B.

Our conclusion is also supported by reference to the statutory language and scheme of the MRRA, as well as by consideration of the practical impacts that imposition of the normal conditions would have upon the entire reorganization effort.

Two provisions within the MRRA are plainly contradictory to a ninety day notice provision. In Section 5(a)(1), the reorganization court is empowered to authorize the termination of service on a line to be abandoned during the period for appeal of the original abandonment order. The order authorizing such termination, in addition, may not be stayed. As the special master made clear: "Since Congress took affirmative steps to permit the cessation of service during an appeal period immediately following authorization of an abandonment, the suggestion that it also required labor protection which might delay cessation of service for [ninety] days is not logical." S.A. at 50. Secondly, in Section 7 of the MRRA, 45 U.S.C. § 906 (Supp. III 1979), Congress provided subordinated loans to the Milwaukee for a sixty day period subsequent to the date the abandonments may first be authorized. The imposition of a ninety day notice requirement would be inconsistent with the Congressional determination to support continued operation of the non-core portions of the Milwaukee for only sixty days. Operations would cease and employees would be unemployed absent either ninety days notice or a final implementing agreement.

Moreover, a ninety day delay would be contrary to the reorganization scheme envisioned by the MRRA, because the trustee could not rapidly cease operation of unprofitable lines. The scheme contemplated the trustee's ability to rapidly cease such unprofitable service. Imposition of a ninety day delay in service termination would eliminate that essential element and might very well defeat any reorganization whatsoever.

A ninety day notice requirement as well as a mandate for final negotiation are also impractical and would not benefit any party to the reorganization. Due to the embargo currently in effect, Milwaukee employees, if

the two conditions are imposed as RLEA requests, would be without employment, pay, and most if not all the protective benefits under the MRRA. The entire reorganization effort might be impeded due to the delays, and the businesses and communities which would normally use the Milwaukee lines would be injured by the interruption of service.

We are also mindful that the primary purpose of the notice and negotiation requirements is to resolve the assignment and selection of employees by an acquiring carrier. A shorter time is necessary and logical, given that there may be no acquiring carrier in abandonments and therefore no assignment or employee selection is required.

C.

We note at this juncture that RLEA presents an apparently inconsistent argument that ninety days notice is not the level required prior to the Milwaukee abandonments. On the one hand, RLEA has argued that the ninety day period is the statutory minimum. On the other hand, RLEA avers here that there is a mandatory minimum level of protection which might be less than ninety days, but which ensures that the carrier's actions are not unilateral in effect.[4] During the negotiation period, RLEA contends that the carrier should not be permitted to make unilateral changes in working conditions, including amendment of seniority rankings.

If RLEA is arguing that labor did not have the opportunity to negotiate with the trustee after the ten day period had elapsed and therefore the trustee had acted unilaterally, such an argument must fail for two

[4] The fact that RLEA now appears to suggest that the ninety day period may not be required (Tr. at 56, Special Master Proceedings Jan. 16, 1980), gives further support to our conclusion that the usual statutory minimum protective levels are inapplicable in this reorganization. Since RLEA concedes this, they must also concede that this proceeding is not the usual proceeding or merger where ninety days and no less would be required.

reasons. First, the reorganization court is empowered to supervise the trustee's actions to ensure complete compliance with the MRRA, other statutes, and pertinent ICC procedures. Thus, unilateral actions, if they do in fact arise, may be rectified by the reorganization court itself. Second and most importantly, is the protective condition which guarantees that any employee who suffers a loss in the absence of final negotiation of an implementing agreement will be "made whole." RLEA assails the "make whole" provision as being unprotective of seniority rights, in that employee seniority rights will arguably be lost at a subsequent date in the absence of a final negotiated agreement. However, the "make whole" provision does have the approval of the reorganization court, which has retained jurisdiction to effect, *inter alia*, the respective labor guarantees. The court itself may resolve seniority disputes in the unlikely event that such problems do in fact occur.

D.

Since we find that the Milwaukee proceedings are anything but usual and that the normally imposed minimum protective levels are inapplicable, our inquiry must briefly turn to the issue of whether the ten day notice requirement with no prior negotiation is a fair and equitable arrangement at least as protective of the interests of employees under Section 11347.

The gravamen of RLEA's argument is that the reorganization court lacked the discretion to deprive employees of the usual protection levels because the conditions imposed were allegedly less protective than those required under Section 11347. RLEA contends that any level of protection not precisely congruent to the conditions of *Oregon Short Line III* and *New York Dock II* provides less benefits than allowed under Section 11347.

The requirements, to the contrary, are not less protective, are fair and equitable, and represent a compromise array of labor protective conditions which are intended to enable the Milwaukee to reorganize while simultaneously protecting the interests of its

employees, the trustee, and others. In the usual abandonment, the ninety day period serves, *inter alia*, to protect the employees by providing them with sufficient notice of pending displacement, reassignment, or dismissal. Shortening of the period is proper here, given that the nature of the abandonment transactions contemplated by the trustee have been a matter of public record for many months.

In addition, the circumstances in the Milwaukee reorganization do not permit the trustee to await final negotiation of an implementing agreement between the trustee and labor. RLEA properly submits that the primary purpose of an implementing agreement is to establish the seniority of employees of an abandoning railroad who are hired by the acquiring railroad (if one exists). RLEA has failed, however, to sufficiently detail how an employee would be prejudiced if an implementing agreement has not been finalized prior to consummation of the transaction. This failure is especially evident in view of the fact that the labor protection agreement must provide that any employee improperly displaced, dismissed, or reassigned prior to final negotiation of such an agreement be made whole for any losses suffered thereby. The effected provisions comprise an adequate alternative to requiring a final agreement, in view of Congress' intent to expedite such transactions under MRRA Section 5(a). Labor is not precluded from reaching an agreement, if one becomes necessary, on any abandonment, sale, or transfer.

II.

RLEA also challenges the reorganization court's determination that it was empowered to permit the trustee to defer payment of labor protection benefits pending final outcome of the reorganization proceedings.[5] At issue is the timing of the payment of the traditional Appendix B—*Oregon Short Line III* labor protective benefits. The special master and the re-

[5] This issue is addressed in appeal Nos. 80-1347 and 80-1545.

organization court determined that payment of the benefits should properly be deferred pending completion of the Milwaukee reorganization. RLEA submits that the benefits must be made available to the employees as they accrue and therefore any payment deferral is improper as well as contrary to provisions within the MRRA. The considerations which follow dictate that the trustee's payment of traditional labor protection benefits must await final consummation of the Milwaukee reorganization.

In the normal railroad abandonment or other transaction, the ICC conditions the termination upon payment of the traditional *Oregon Short Line III—New York Dock II* employee protective benefits which provide, *inter alia*, an election of either six years of guaranteed annual income or a lump sum separation allowance for sixteen and one-half months.[6] If these traditional conditions were imposed upon the Milwaukee abandonments necessary to reduce its operations to a manageable core, the benefits would total, as the record indicates, anywhere from $300 million to $1.2 billion, with the closest estimation of $350 million.[7] Report of the Special Master, Feb. 20, 1980 at 20, S.A. at 38. *See* 125 CONG. REC. H10213 (Daily ed. Nov. 2, 1979) (remarks of Rep. Madigan); 125 CONG. REC. H9909, H9920 (Daily ed. Oct. 30, 1979) (remarks of Reps. Madigan and Hagedorn respectively). Such an obligation upon the Milwaukee estate, as both the record and related legislative history reveal, would preclude any possibility of reorganization

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[6] Also included are provisions concerning fringe benefits, displacement allowances, and moving expenses.

[7] RLEA incorrectly avers that the trustee has failed to prove that the immediate payment of the benefits would approach $350 million. Reference to both the legislative history, *infra*, and to the record itself, exhibit that this estimate is reasonable and quite realistic. S.A. at 38. The estimate, in addition, represents the expense of the *total* of all Milwaukee transactions, not only those involved in these appeals. It is this overall impact which Congress sought to alleviate through enactment of the MRRA.

whatsoever, for the estate could not generate the required funds to pay such a substantial sum. *Id.*

To alleviate this hardship upon the estate, while simultaneously attempting to provide the employees with a lesser level of protection which the estate could realistically absorb immediately, Congress in the MRRA adopted a compromise proposal similar to that suggested in the trustee's reorganization plan.[8] Under the proposal, as adopted, each Milwaukee employee is given the option of accepting guaranteed prompt payment of reduced labor protection benefits in return for waiving his or her right to traditional ICC or contractual benefits. MRRA Section 13, 45 U.S.C. § 912 (Supp. III 1979). The option would be attractive, as the record shows, due to: the cashlessness of the Milwaukee estate, the unresolved issues concerning the priority and ultimate payment of traditional benefits,[9] and the subsequent resolution and prioritization of the rights of all creditors whose claims *might* be subject to suspension, deferral, or other modification in the interest of a successful reorganization.

MRRA Sections 9 and 15, 45 U.S.C. §§ 908, 914 (Supp. III 1979) require the trustee and labor to negotiate an optional protective arrangement whereby employees affected by the reorganization would be assured of some form of prompt and guaranteed monetary benefits.

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[8] The proposal for the settlement of labor benefit payment appears in Sections 8 through 15 of the MRRA, 45 U.S.C. §§ 907-914 (Supp. III 1979).

[9] In the event of Milwaukee liquidation, employees *might* not receive any labor benefits whatsoever. *See RLEA v. Gibbons*, 448 U.S. 1301-05 (Stevens, Circuit Justice 1980), *stay denied per curiam*, 448 U.S. 909 (1980), *cert. granted*, 49 U.S.L.W. 3799 (April 24, 1981); *Matter of New York, Susquehanna & Western Railroad Co.*, 504 F. Supp. 851, 859-63 (D.N.J. 1980). *See also North Hampton & Bath Railroad Co.—Abandonment*, 354 I.C.C. 784 (1978). While this issue need not be resolved in this appeal, the uncertainty which it presents is one factor which an employee would certainly consider in benefit selection.

Federal financing of up to $75 million is provided to fund the payments. 45 U.S.C. § 914 (Supp. III 1979). The benefits, as implemented in the arrangement between the trustee and the Milwaukee's labor unions, include, *inter alia*, a displacement allowance equal to eighty percent of an employee's previous compensation for a three year period, or at the employee's option, a dismissal allowance equal to $2,000 per year of service to the Milwaukee up to a maximum payment of $25,000.[10] S.A. at 40.

In proceedings before the special master, the trustee argued that payment of traditional Appendix B—*Oregon Short Line III* benefits be deferred and considered in a consummated plan along with the payment of other creditors. S.A. at 4. RLEA urged in the abandonments at issue that the Milwaukee be required to pay traditional benefits immediately. The special master recommended that the trustee be authorized to defer payment of traditional labor protection benefits under Appendix B. S.A. at 56, 127-28. The reorganization court adopted the report and recommendation of the master. Order Nos. 276-B, 307, 307A. This appeal followed.

A.

At the heart of our resolution of the deferral issue is the question of whether the imposition of traditional labor protection benefits, in lieu of the guaranteed benefits provided within the MRRA, is an expense of administration of the Milwaukee estate, and is therefore payable as the specific benefits accrue. The special master inferred and the reorganization court agreed that traditional benefit payments were not an expense of administration. S.A. at 45, 72-74. We agree and note that our holding that payment of traditional benefits here cannot be classifiable as an administrative expense is limited to

[10] Other benefits include moving expenses, partial reimbursement for educational expenses, and preferential employment rights on other railroads.

instances where the facts are similar to those present here *and* where Congress has also addressed the issue (here under the MRRA).[11] In reaching this conclusion, we must reference appropriate canons and maxims of statutory construction and must also ascertain the intent of Congress in its enactment of the MRRA.[12]

We begin by construing provisions within the MRRA. As this court has observed, "the starting point in every case involving the construction of a statute is the language itself." *Canadian Imperial Bank of Commerce Trust Co. v. Fingland*, 615 F.2d 465, 468 (7th Cir. 1980), *citing International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Daniel*, 439 U.S. 551, 558 (1979). Section 9 of the MRRA, 45 U.S.C. § 908, provides that the benefits and allowances within the elective scheme "shall be treated as administrative expenses of the estate of the Milwaukee Railroad." Therefore, these claims are immediately payable upon appropriate employee election. In addition, the MRRA is devoid of any mention of timing or deferral of traditional benefits and does not state whether traditional benefits are classifiable as administrative expenses.[13]

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[11] Accordingly, we make no ruling upon whether payment of traditional benefits in *all* other railroad transactions is properly viewed as an administrative expense.

[12] Discussion of related decisional law appears in Section IIB of this opinion, *infra*.

[13] RLEA erroneously contends that MRRA Section 5(c), which provides "Nothing in this section shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this chapter," mandates that traditional benefits be paid immediately. This is so, RLEA urges, for two reasons. RLEA first says that MRRA Section 5(a) requires imposition of a protective arrangement at least as protective of the interests of employees as detailed under Section 11347. However, neither the traditional benefits nor the provisions within Section 11347 address the timing or priority of payments in a reorganization. They concern only the *amount* of the payments. Timing or priority are properly left to the reasoned

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Our construction of the MRRA is guided in part by reference to the maxim of statutory construction—*expressio unius est exclusio alterius*—which means literally that the expression of one thing is the exclusion of the other. The maxim is not a rule of substantive law and is only one of statutory construction whose use is occasionally rejected.[14] *Newberger v. Commissioner of Internal Revenue*, 311 U.S. 83 (1940); *United States v. Massachusetts Bay Transportation Authority*, 614 F.2d 27, 28 (1st Cir. 1980); *E.E.O.C. v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1362 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975); 2A Sands, *Sutherland on Statutory Construction*, § 47.23, at 123 (4th ed. 1973). Application of this maxim indicates that Congress, upon passing the MRRA, did not intend to require traditional labor protection benefits to be treated as an administrative expense upon the Milwaukee estate.[15] *See Martin v. Hamil*, 608 F.2d 725, 728 (7th Cir. 1979). If Congress had so intended, such intention would have been clear from express reference within the MRRA itself.[16] Since Congress stated that the

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[13] *continued*

discretion of the reorganization court. Second, RLEA states that under prior law, the payment of traditional benefits are in all instances administrative expenses. Since we find that under these facts and where Congress in the MRRA so provides that the benefits are *not* administrative expenses, this argument must fail.

[14] For cases rejecting the maxim for reasons not pertinent here, *see Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 755 n.2 (7th Cir. 1979); *National Petroleum Refiners Ass'n v. F.T.C.*, 157 U.S. App. D.C. 83, 482 F.2d 672 (1973), *cert. denied*, 415 U.S. 951 (1974). *See also* Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863 (1930).

[15] We note that it is generally for Congress to enumerate which items of expense connected with or growing out of the operation of the Milwaukee are to have priority in reorganization proceedings. *See Central Hanover Bank & Trust Co. v. Williams*, 95 F.2d 210, 212 (8th Cir. 1938).

[16] Had Congress intended to require traditional benefits to be treated as an administrative expense, it appears unlikely that it would have manifested such intent indirectly. *Matter of Central Railroad of New Jersey*, 579 F.2d 804, 816 (3d Cir. 1978).

optional benefits are to be classified as an administrative expense, in the absence of a similar statement concerning traditional benefits, the benefits are not similarly classifiable. *See Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d 668, 675 (5th Cir. 1978). Further, careful exclusion of a like provision for traditional benefits indicates that the exclusion was intentional. Thus, the provision should not be implied where excluded. *Marshall v. Western Union Telegraph Co.*, 621 F.2d 1246, 1251 (3d Cir. 1980).

We find this to be a proper inference to draw from the MRRA. *See Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F.2d 1216, 1223-24 (9th Cir. 1978), *cert. denied*, 444 U.S. 826 (1979). However, to ensure that nothing contradicts this inference, an examination of the MRRA legislative history and construction of the statute as a whole must be completed. *Martin v. Hamil, supra*, 608 F.2d at 728; *Hill v. Whitlock Oil Services, Inc.*, 450 F.2d 170, 173, 14 A.L.R. Fed. 895 (10th Cir. 1971); *Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*, 312 F.2d 214, 220 (1st Cir. 1963), *aff'd*, 377 U.S. 235 (1964).

Pertinent legislative history of the MRRA is indicative that the Act was designed to "[a]ssure a prompt and workable method for reorganizing the Railroad by . . . providing an affordable method of employee protection which will not totally erode all the assets of the Milwaukee estate." 125 CONG. REC. H10212 (Daily ed. Nov. 2, 1979) (remarks of Rep. Madigan). In structuring this method of protection, it is evident that Congress contemplated that payment of traditional benefits are not administrative expenses and therefore must be deferred.[17] Congressman Madigan, one of the MRRA House sponsors, when addressing the utility of the MRRA

[17] We also note that we have failed to locate and RLEA has failed to cite any language within the MRRA legislative history which directly or even indirectly indicates that Congress intended traditional benefit payments to be currently payable as an administrative expense.

"option" provisions for labor protection, stated that "[s]ince traditional labor protection from the Milwaukee Railroad *would be subject to lengthy litigation* it is our belief that most employees would elect to receive the labor protection provided under [the MRRA]." 125 CONG. REC. H9909 (Daily ed. Oct. 30, 1979) (emphasis added). This sentiment was echoed by Congressman Daschle: "Under this bill, employees who lose their jobs or are transferred elsewhere would receive immediate benefits, provided they forego other traditional labor benefits which are *usually accompanied by litigation and years-long delays in receiving claims.*" *Id.*, at H9915 (emphasis added). Congressman Marlenee said that the MRRA "[a]llows an employee to choose the option of receiving labor protection benefits quickly or waiting to receive traditional labor protection. . . ." *Id.*, at H9918.

Since traditional benefit payment must be deferred, it follows that Congress intended that they not be viewed as an administrative expense, as it is settled that under normal circumstances, payment of administrative expenses must occur as the expenses accrue and may not be deferred.

Construction of the MRRA as a whole also supports our conclusion. It is perhaps the oldest canon of statutory construction that a statute be interpreted with the overriding purpose of Congress kept firmly in mind. *Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 641 F.2d 482, 487 (7th Cir. 1981) (and the authorities cited therein); *Atchison, Topeka, and Santa Fe Railway Co. v. United States*, 617 F.2d 485, 490 (7th Cir. 1980). Here, Congress envisioned provision of employee benefits which would not totally erode the estate's assets. RLEA's interpretation would serve to negate this purpose, as immediate payment of traditional benefits would render the elective benefit provisions meaningless. No employee, when presented with the choice of eighty percent of his or her income for three years (under the MRRA elective scheme) or one hundred percent of his or her income for six years (under the traditionally imposed scheme) would select the less-

er elective provisions.[18] Accordingly, the Milwaukee would be faced with a very large liability payable immediately, which would likely result in liquidation of the total estate.[19] Even though the levels within the optional scheme were derived from agreement between labor and the trustee, Congress could not have intended that traditional benefits not be deferred.[20]

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[18] Here, RLEA attempts to distinguish the two benefit schemes as being so different and respectively attractive that a significant number of employees would opt for the lesser optional payments if both choices were simultaneously available. They argue that the seniority, separation allowances and other provisions are dissimilar enough to render each scheme uniquely desirable. To the contrary, the record indicates that the schemes are in effect indistinguishable. Therefore, it is unreasonable to expect employees to opt for a lesser benefit package when a more attractive full package is also available.

It is clear that Congress envisioned that any optional scheme within the MRRA would contain *lower* protective levels than those traditionally imposed. Thus, the essential inquiry here is not the comparison between the exact details of the two schemes, as the MRRA itself contains no mention of specific benefit provisions. Our task is to interpret the MRRA to ascertain the intent of Congress in order to determine if Congress could have contemplated that the elective scheme would be available at the same time of the superior traditional benefit scheme.

We are also mindful of a cardinal rule of statutory construction which effects a presumption against interpreting a statute in a manner which would render the statutory scheme ineffective or inefficient, or which would cause grave public injury. *Aluminum Co. of America v. Dep't of Treasury of the State of Michigan*, 522 F.2d 1120, 1126-27 (6th Cir. 1975). RLEA has not overcome this presumption and has failed to prove that any employee would opt for any clearly less desirable benefit scheme.

[19] *See* discussion corresponding to notes 7 and 8, *supra*.

[20] We reach this conclusion while cognizant of our duty to favor an interpretation which would render the statutory design of the MRRA effective in terms of the Congressional policies behind its enactment and "[t]o avoid an interpretation which would make such policies more difficult of fulfillment,

(Footnote continued on following page)

Moreover, acceptance of RLEA's position would render the MRRA optional scheme a mere redundancy, in violation of another well-known principle of statutory construction that all provisions within a statute are to be interpreted as meaningful and are not to be considered as mere surplusage. *National Federation of Federal Employees v. Brown*, 481 F. Supp. 704, 708-09 (D.D.C. 1979) (and the citations therein), *rev'd on other grounds*, 645 F.2d 1017 (D.C. Cir. 1981); *Lawfman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 498 (S.D. Ohio 1976). It is axiomatic that the MRRA must be construed to prevent the optional scheme from being rendered inoperative or superfluous. *Ziegler Coal Co. v. Kleppe*, 175 U.S. App. D.C. 371, 536 F.2d 398, 406 (1976). *See United States v. Menasche*, 348 U.S. 528 (1955).

Accordingly, we conclude that, under these facts and where Congress has so directed, traditional labor protection benefits are not classifiable as an expense of administration of the Milwaukee estate. Their payment must be deferred.

B.

Aside from reference to both well-settled rules of statutory construction and the legislative history of the MRRA, our resolution of two additional sub-issues—priority and ICC order compliance—compels us to conclude that the traditional benefit payment must be deferred.

First, payment deferral of traditional benefits is also required because the actual priority of such claims is unclear and cannot be fully ascertained until the reorganization plan is finalized. We have concluded thus far

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[20] *continued*
particularly where . . . that interpretation is consistent with the plain language of the statute [to be construed]." *Motor and Equipment Manufacturers Ass'n, Inc. v. E.P.A.*, 201 U.S. App. D.C. 109, 627 F.2d 1095, 1108 (1979), *cert. denied*, 446 U.S. 952 (1980), *quoting National Petroleum Refiners Ass'n v. F.T.C.*, *supra*, 482 F.2d at 689.

that the traditional protective benefits are *not* properly classifiable as administrative expenses currently payable. However, our conclusion does not settle the issue of the proper priority to be accorded to the traditional benefits if and when they are ultimately paid. While the question of actual priority is not before us, and therefore need not be resolved in this appeal, analysis of the many considerations which will aid in its eventual determination is instructive as to our resolution of the issue of traditional benefit deferral.

RLEA argues that payment of traditional benefits must never be deferred and must be paid as incurred. RLEA bases its claim upon two sub-arguments: (1) that the benefits are expenses of administration—a view we have already rejected, and (2) that the traditional benefits are not deferrable and must be granted first priority since they are necessary: to preserve the estate, to satisfy the public interest, and to prevent a severe loss of employee morale; *citing United States v. Lowden*, 308 U.S. 225 (1939), and *In re Penn Central Transportation Co.*, 484 F.2d 1300, 1302 n.2 and n.3 (3d Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). In essence, RLEA avers that the failure to provide traditional benefits as incurred amounts to a violative failure to provide meaningful employee protection. Therefore, the public interest demands that these payments not be deferred. We cannot agree.

The public interest, if anything, mandates benefit deferral under these facts, given that some attractive options are immediately available to Milwaukee employees and that deferral is needed, as the record reveals, to preserve any possibility of reorganization at a future date. *See Matter of Chicago, Rock Island, and Pacific Railroad Co.*, 545 F.2d 1087, 1090-91 (7th Cir. 1976). The benefits are only to be deferred here, and in all likelihood *will* in fact be paid. We find the employees to be fairly and equitably treated under either scheme. *See United States v. Lowden, supra*, 308 U.S. at 238. Further, both schemes, when viewed in combination, do provide meaningful employee protection. It is unreasonable to conclude that deferral will result in low em-

ployee morale, as we have been unable to locate any record evidence which would support such an argument.

RLEA incorrectly submits that the purpose behind traditional labor protection benefits is to mitigate the harsh consequences of reorganization at the time they are visited upon the employees. Since the consequences affect the employees immediately, RLEA contends that the traditional benefits should be made available when the consequences in fact arise. To the contrary, Congress recognized and resolved this problem by enacting the alternative benefit scheme and contemplated, as noted earlier, that traditional benefit payment must be deferred.

We turn briefly to the decisions which come the closest to resolving the deferral and priority issues. They involve the priority of severance payments in non-railroad reorganizations, with the payments either possessing a contractual foundation or being derived from past company practice. The cases turn on the issue of whether the severance payments are classifiable as a "cost and expense of administration" under Section 64(a)(1) of the Bankruptcy Act, 11 U.S.C. § 104(a)(1) (now repealed).[21] In cases where the severance payments vary in accordance with the length of an employee's service (as do the traditional benefits here), three courts of appeals have

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[21] Section 64(a) (1) of the Bankruptcy Act provides in part as follows:

> The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition. . . .

We also note that since this reorganization was filed prior to October 1, 1979, the applicable law is the old Bankruptcy Act and not the new Bankruptcy Code. *See* Bankruptcy Reform Act of 1978, § 403, Pub. L. No. 95-598, 92 Stat. 2683 (Nov. 6, 1978).

considered the problem, reaching divergent results.[22] Two circuits have held that only that portion of a severance pay claim which is apportionable to employee service rendered after filing of the arrangement may be afforded cost of administration status under Section 64(a)(1). Accordingly, benefits related to employee service rendered before the filing are not payable as accrued. *In re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir. 1976); *In re Public Ledger, Inc.*, 161 F.2d 762 (3d Cir. 1947). Another circuit, however, has held that the entire amount of the variable payments is entitled to first priority as an administrative expense. *Straus-Duparquet, Inc. v. Local Union No. 3 International Brotherhood of Electrical Workers*, 386 F.2d 649 (2d Cir. 1967).[23]

The former holdings are based upon the view that because the amount of severance pay depends upon the length of employment, the consideration supporting the employees' claims was the service performed over the

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[22] In cases where the trustee has assumed an employment contract which provides that all discharged employees are entitled to their salaries as severance pay for a brief time period subsequent to discharge, the payments are viewed as administrative expenses replete with Section 64(a)(1) priority. *In re Public Ledger*, 161 F.2d 762, 770-73 (3d Cir. 1947). *See In re Mammoth Mart, Inc.*, 536 F.2d 950, 953 (1st Cir. 1976) (and the cases cited therein); *Matter of Schatz Federal Bearings Co., Inc.*, 5 B.R.W. 549 (S.D.N.Y. Brptcy 1980). *See also Matter of Central Railroad Co. of New Jersey*, 579 F.2d 804, 815-17 (3d Cir. 1978).

Here, there is no similar employment contract and it cannot be said that the severance payments are wholly earned and accrued solely due to the trustee's management. Thus, these cases are not controlling. *See In re Public Ledger, supra*, 161 F.2d at 771, 773.

[23] This decision was recently reaffirmed by the Second Circuit in *In re W. T. Grant Co.*, 620 F.2d 319 (per curiam), *cert. denied*, 446 U.S. 983 (1980), where the court declined to overrule *Straus-Duparquet* based upon an argument that the *Mammoth Mart* court refused to accept its earlier reasoning in *Straus-Duparquet*. *See Matter of Unishops, Inc.*, 553 F.2d 305, 308 (2d Cir. 1977).

entire employment period. Thus, only that portion of the benefits directly attributable to the services performed for the trustee as the debtor-in-possession are entitled to priority. *In re Mammoth Mart, Inc., supra*, 536 F.2d at 954-55. The latter holding is grounded upon rationale which views severance pay as not being earned day to day. Rather, severance pay is considered to be compensation for employment termination, since the termination is incident to administration of the bankrupt's estate. *Straus-Duparquet, supra*, 386 F.2d at 651; *In re W. T. Grant Co.*, 620 F.2d 319, 321 (2d Cir.) (per curiam), *cert. denied*, 446 U.S. 983 (1980). It follows, said the court, that the full amount of the severance benefits are incident to the trustee's continued operation of the business.[24]

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[24] The First Circuit in *Mammoth Mart* rejected the *Straus-Duparquet* reasoning as unpersuasive, 536 F.2d at 955 (citations omitted):

> It is established that a debt is not entitled to priority as a cost and expense of administration simply because the claimants' right to payment arises after the debtor-in-possession has taken some action. . . . It is only when the debtor-in-possession's actions themselves—that is, considered apart from any obligation of the debtor—give rise to a legal liability that the claimant is entitled to the priority of a cost and expense of administration. When the debtor-in-possession commits a tort, . . . or accepts services from a third party without paying for them, the debtor-in-possession itself caused legally cognizable injury, and the resulting claims for compensation are entitled to first priority. Here the . . . severance pay that the debtor-in-possession paid appellants fully compensated them for the services performed after the petition was filed. The claims for additional severance pay are based entirely upon services performed by appellants to the debtor and, as such, are not entitled to priority.

In our case, it is hard to imagine that payment of traditional benefits renders any benefit to the trustee or has any relation to the preservation, development, or distribution of the assets of the Milwaukee estate, especially in light of the optional benefit scheme within the MRRA.

We note that none of these decisions is strictly applicable to this appeal. Each involved bankruptcy proceedings to which Section 64 is made expressly applicable and where voluntary severance pay programs were in effect. They are not precedent for the treatment of an involuntary, statutorily imposed benefit program as is present here. Moreover, there is serious doubt as to whether Section 64 applies to reorganization proceedings under Section 77. Collier states that it is "extremely doubtful" that Section 64 is applicable. Collier also indicates, as the special master noted, S.A. at 28, that the principles derived in equity receiverships are controlling in priority resolution under Section 77. Collier, *Bankruptcy*, Vol. 5, ¶77.21 at 608-09 (14th ed. 1978). *See In re Penn Central Transportation Co.*, 520 F.2d 1388, 1391 (3d Cir. 1975).

These conflicting authorities, aside from their general inapplicability, do not resolve the priority question as it relates generally to the deferral issue. Accordingly, we decline to adopt either view at this juncture, and instead base our resolution upon other considerations. Deferral should be resolved while cognizant of both the need to conserve estate assets for reorganization and to ensure "fairness to all persons having claims against the insolvent."[25] *Reading Co. v. Brown*, 391 U.S. 471, 477 (1968). Neither *Mammoth Mart*, *Public Ledger*, nor *Straus-Duparquet* give adequate consideration to the fairness issue required by *Reading*, as each only prioritizes actions which benefit the trustee or which accrue as a result of the trustee's administration of the respective estates. Here, fairness mandates, as the special master found, a consideration of: the ultimate fate of the Milwaukee, the total amount of benefits to be paid, the effect of the benefit claims upon the overall reorganization effort, and the impact that affording priority to the employee

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[25] Under the Bankruptcy Act itself, even where provision is made for priority classification of certain creditors (secured creditors for example), no timetable is established for the eventual payment of such claims. *Matter of Penn Central Transportation Co.*, 553 F.2d 12, 16 (3d Cir. 1977).

claims to traditional benefits will have upon other Milwaukee creditors. S.A. at 29-30.

Moreover, acceptance of RLEA's position that traditional benefits are currently payable as accrued would result in the reorganization court placing in priority one set of claims against the estate over all other equally significant claims. This occurrence would result in subordination of other claims in favor of the employees' claims. Such an unfair result simply cannot stand.

It is settled that the general theme of the Bankruptcy Act is "equality of distribution." If one claimant is to be preferred over others, the purpose should appear from the pertinent statutes. *Nathanson v. N.L.R.B.*, 344 U.S. 25, 29 (1952); *In re Mammoth Mart, Inc.*, *supra*, 536 F.2d at 953. Neither the Bankruptcy Act nor the MRRA require special treatment for traditional employee claims here. To prioritize these claims where they are not clearly entitled to such treatment, is not only inconsistent with the policy of equality of distribution but it also dilutes the value of the priority for the claims of creditors Congress in fact intended to prefer. *In re Mammoth Mart, Inc.*, *supra*, 536 F.2d at 953. *See Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 470-71 n.3 (1974). Aside from being unfair, such an interpretation would also serve to undermine the values promoted within the MRRA and the Bankruptcy Act itself. *In re Mammoth Mart, Inc.*, *supra*, 536 F.2d at 955.

The second factor which compels us to conclude that deferral is required concerns the relationship between the ICC and the reorganization court. RLEA argues that traditional benefits may not be deferred because a reorganization court is powerless to defer benefit payment if such payment has been effected pursuant to an ICC order under either 49 U.S.C. §§ 10903(b)(2) or 11347 (1976 and Supp. III 1979). In support, RLEA cites *Matter of Chicago, Rock Island and Pacific Railroad Co.*, 537 F.2d 906 (7th Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977) and *In re Lehigh Valley Railroad Co.*, 508 F.2d 332 (3d Cir. 1975). These cases address the balance of authority between the ICC and the reorganiza-

tion court related to certain transactions (interline accounts) between the bankrupt and other carriers.

Both cases indicate that the reorganization court is powerless to exempt a bankrupt railroad from compliance with ICC orders. *Rock Island, supra*, 537 F.2d at 910; *Lehigh Valley, supra*, 508 F.2d at 338. Neither case, however, involved labor protection and both predated the MRRA. RLEA contends that employee protective conditions which the ICC imposes under Sections 10903 or 11347 represent an integral portion of any ICC abandonment authorization and accordingly a Section 77 reorganization court is without authority to vary the terms of such ICC orders. RLEA mistakenly says that since the ICC requires labor benefit payment pursuant to its abandonment orders, the reorganization court in these abandonments violated the terms of the orders by deferring traditional benefit payment.

RLEA's argument is off-track for several reasons. First, Congress has indicated, in enacting the MRRA, that the ICC's authority over Milwaukee abandonments is merely advisory. Authority over these abandonments is clearly vested with the reorganization court. MRRA Section 5(a), 45 U.S.C. § 904(a). Hence, Congress itself has preempted normal ICC orders, and therefore the ICC orders here cannot possibly possess the controlling effect urged by RLEA. Upon preemption, there remain simply no ICC orders to be exempted from, *see Matter of Penn Central Transportation Co.*, 553 F.2d 12, 15-16 (3d Cir. 1977), and no specific order directed to this reorganization trustee has been violated, *see Matter of Boston and Maine Corp.*, 600 F.2d 307, 312-13 (1st Cir. 1979).

Second, both cases cited by RLEA pertain to ICC orders concerning ongoing operations of the trustee as part of the operation of a railroad in reorganization. *Rock Island, supra*, 537 F.2d at 910-11; *Lehigh Valley, supra*, 508 F.2d at 333, 338. The ICC orders at issue in the cases were related to comprehensive and mandatorily imposed ICC regulation of all aspects of settlement of per diem interline accounts, which were properly

considered as an integral portion of the respective railroad operations." *Id.* The matter before us—employee labor protection—is *not* classifiable as a segment of operation of the Milwaukee by the trustee and is not governed here by ICC orders concerning railroad operation.[27] In addition, we are hard-pressed to envision payment of traditional benefits as a segment of actual Milwaukee operation when no benefits whatsoever may be owing in the event of total liquidation of the Milwaukee estate.[28]

C.

In any event, it is well settled that the reorganization court possesses broad discretionary authority to postpone the satisfaction of valid claims upon the estate's assets, *including* those having priority, where postponement is required to ensure that the Section 77 railroad reorganization will be completed. Section 77(a), 11 U.S.C. § 205(a) (repealed 1978).[29] This authority is derived in part from *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railroad Co.*, 294 U.S. 648 (1935) ("*Continental Illinois*").[30] There, the

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[26] Thus, the reorganization court was correct in limiting the *Rock Island* decision to its special circumstances. Order No. 276B at 3-4, S.A. at 73-74.

[27] While, we recognize the broad ICC authority over general operations of the nation's railroads, when issues unique to reorganization are involved which mandate discretion, flexibility and fairness be available to the reorganization court, primacy must be accorded to that court's determinations, absent reasons to the contrary not present here. *Matter of Penn Central Transportation Co., supra*, 553 F.2d at 16.

[28] *See* note 9, *supra*.

[29] *See* note 21, *supra*.

[30] RLEA attempts to distinguish *Continental Illinois* by contending that claims for traditional benefits are not pre-reorganization claims and therefore the citation is inapplicable. To us, this distinction must be derailed. We read *Continental Illinois* and its progeny as vesting the reorgan-

(Footnote continued on following page)

Supreme Court relied upon the need for preservation of the estate's assets for use in reorganization in upholding the issuance of an injunction which prohibited a secured creditor from selling collateral in its possession; given that the sale would so hinder, obstruct, or delay the preparation and eventual consummation of a reorganization plan and might possibly prevent plan finalization altogether. *Id.*, at 676-77. The Court said, 294 U.S. at 676:

> [A reorganization] proceeding under § 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the Section, and thereby to render its provisions futile.

This court has cited *Continental Illinois* with approval in *In re Brown*, 84 F.2d 433, 436 (7th Cir. 1936). There, we affirmed entry of an injunction aimed at prevention of sale of stock pledged as collateral.

This broad discretionary power has evolved to afford the reorganization court the authority to defer both pre- and post-petition claim payment.[31] *Continental Illinois*,

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[30] *continued*
ization court with broad discretionary authority to act to ensure eventual consummation of a viable reorganization plan. Accordingly, it is irrelevant whether the claim arose either pre- or post-reorganization, as even post-reorganization claims are properly deferred in certain instances. *See In re Penn Central Transportation Co.*, 452 F. 2d 1107 (3d Cir. 1971), *cert. denied*, 406 U.S. 944 (1972). In fact, RLEA explicitly acknowledges this power of the reorganization court. Brief for Appellant RLEA, at 61-62.

[31] This power has been recognized by the Milwaukee reorganization court elsewhere in this proceeding. The record indicates that other claims have been deferred including, *inter alia:* payments of principal and interest on fixed and funded debt; with certain exceptions, the enforcement of judgments, liens, and setoffs of obligations; payment of retroactive wage increases and post-petition vacation pay; and payment of state and local taxes.

supra, 294 U.S. at 676-77. *See, e.g., Thompson v. Texas Mexican Railroad Co.*, 328 U.S. 134, 143-44 (1946) (enforcement of contractual provisions of the debtor deferred pending ICC review); *Matter of Boston and Maine Corp.*, 600 F.2d 307, 308-10 (1st Cir. 1979) (deferral of pre-reorganization freight car per diem charges); *Matter of Lehigh Valley Railroad Co.*, 458 F.2d 1041, 1045 (3d Cir. 1972) (payment of lien on debtor's property deferred); *In re Penn Central Transportation Co.*, 452 F.2d 1107, 1108-09 (3d Cir. 1971), *cert. denied*, 406 U.S. 944 (1972) (payment of taxes accruing during the reorganization were deferred). In addition, the Third Circuit has even gone so far as to adopt a "rule of necessity" which allows for the immediate payment of some administrative expenses while others are deferred.[32] *See Matter of Reading Co.*, 439 F. Supp. 389, 391 (E.D. Pa. 1977), *aff'd without opinion*, 633 F.2d 211 (3d Cir. 1980),

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[32] There, the court stated:

> . . . Since they accrued during reorganization the taxes here at issue are administrative expenses entitled ultimately to share pro rata with all claims within the first priority classification under section 64 of the Act, 11 U.S.C. § 104. Pro rata participation, however, does not necessarily imply that all claims are entitled to simultaneous participation. To so hold would unduly impair the flexibility so essential to a reorganization proceeding.
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> * * * *
>
> After due inquiry the district court concluded in effect that immediate payment of the property taxes in question would probably defeat the reorganization. It therefore decided that under the circumstances the only viable recourse was to postpone such payment for a reasonable time, taking into consideration the competing public interests inherent in reorganizing the railroad and in maintaining the revenues of the various taxing entities affected by the injunction. . . . Under these circumstances we conclude that section 77 did authorize the reorganization court to enjoin temporarily the payment or collection of the assessed property taxes.

In re Penn Central Transportation Co., supra, 452 F.2d at 1108-09 (citations omitted). *See also Matter of Central Railroad Co. of New Jersey*, 579 F.2d 804, 807 (3d Cir. 1978).

cert. denied, 101 S.Ct. 1997 (1981); *Matter of Penn Central Transportation Co.*, 400 F. Supp. 920, 926 (E.D. Pa. 1975).

Underlying the discretionary authority of the reorganization court is recognition of the object of the Bankruptcy Act's provisions of eventual completion of the reorganization effort. Toward this end, the court is required to maintain the status quo of the debtor pending plan consummation. *Continental Illinois, supra*, 294 U.S. at 679; *Matter of Stanndco Developers, Inc.*, 534 F.2d 1050, 1052 (2d Cir. 1976). *See Penn Central Transportation Co. v. Irving Trust Co.*, 594 F.2d 952, 957 (3d Cir. 1979). The court may, in addition, ensure plan finalization by deferring claim satisfaction as a "virtual court of equity." *Continental Illinois, supra*, 294 U.S. at 675-76; *In re Penn Central Transportation Co.*, 484 F.2d 1300, 1305-06 (3d Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

Recognizing the discretionary authority to defer payment of traditional protective benefits, our inquiry turns to whether that discretion was abused. *See Matter of Chicago, Rock Island and Pacific Railroad Co.*, 545 F.2d 1087, 1090-91 (7th Cir. 1976); *In re West Counties Construction Co.*, 182 F.2d 409, 411 (7th Cir. 1950). As the Supreme Court in *Continental Illinois* noted, 294 U.S. at 677:

> [a] claim [by a creditor] that injurious consequences will result . . . may not, of course, be disregarded by the district court; but it represents a question addressed not to the power of the court, but to its discretion—a matter not subject to interference of an appellate court unless improvidently exercised.

Accord, New Haven Inclusion Cases, 399 U.S. 392, 491-92 (1970); *Matter of Ranchero Motor Inn, Inc.*, 527 F.2d 1044, 1047 (9th Cir. 1975); *In re Diplomat Electric, Inc.*, 499 F.2d 342, 346, 34 A.L.R. Fed. 568 (5th Cir. 1974).

RLEA avers that the reorganization court abused its discretion by permitting deferral in the absence of instituting methodology to guarantee that the court will

periodically review and monitor whether deferral, in whole or in part, must be continued. This argument must fail, in that the record evinces a keen awareness by the court of its continuing duty to reassess the progress of the Milwaukee reorganization and to order the trustee to pay traditional benefits at the earliest feasible date. We remain confident that the court will ably discharge this obligation.

RLEA also states that the abandonments involved in these appeals affect few Milwaukee employees with the total monetary impact being significantly lower than the estimated sum. In addition, RLEA contends that some benefits—those which will not severely drain the estate's assets—should be currently payable and not deferred. Therefore, RLEA implies that the monies payable to the affected employees should be immediately due and that a failure to order prompt payment amounts to an abuse of discretion by the reorganization court. This reasoning is misplaced, in that the reorganization court is powerless, absent special circumstances not present here, to cause the claims of one group of creditors to be singled out to receive special priority of payment. We recognize that it would be very unlikely that immediate benefit payment in any single set of abandonments or other transactions would preclude reorganization. However, in light of fairness considerations detailed earlier, the reorganization court must prevent the opening of a pandora's box of inequities in terms of selecting which set of abandonments or transactions merit early payment, which individual types of benefits (relocation expenses, displacement allowances, health or welfare benefits) can be paid currently and which must be deferred. The court must also protect those employees in transactions to be completed at a later date, when the Milwaukee estate's assets may have been seriously depleted by prior "accelerated" payment of both Section 9 and contractual benefits. Any premature benefit payment would also serve to render the optional protective scheme within the MRRA meaningless. Therefore, no set of abandonments or transactions may be scrutinized in isolation.

Were we to accept RLEA's argument, we could envision a mass of litigation concerning the many present and future Milwaukee transactions each requesting an early determination of the respective labor protection issues, with requests for both accelerated payments and piecemeal judicial inquiries of the efficacy of the individual benefits for each set of transactions. In order to prevent such an onslaught, in all fairness to all creditors and employees, and in light of the public interest considerations presented, traditional employee protective benefits must be paid simultaneously if and when the reorganization is completed.

III.

The final issue raised by RLEA concerns the propriety of the reorganization court's refusal to impose both labor protective conditions and terms of Milwaukee collective bargaining agreements upon non-carrier purchasers of previously abandoned Milwaukee lines. RLEA argues that although the purchasers are merely prospective carriers, they must provide former Milwaukee employees with full labor protection under MRRA Section 5(b)(1). The court, RLEA says, was required to provide an arrangement to protect the Milwaukee employees from the overall impact of the entire transaction —abandonment and acquisition, and not simply from the abandonment segment. In other words, RLEA submits that employee protection and existing collective bargaining obligations should be the responsibility of the new purchasers, rather than of the Milwaukee estate. The reorganization court, to the contrary, characterized the transactions in issue as abandonments followed by subsequent acquisitions by entities which had never operated as carriers. Therefore, the court found the provisions within MRRA Section 5(a)(1) to be applicable and accordingly, the new purchasers were bound by neither labor protective provisions nor existing collective bargaining agreements normally imposed upon the Milwaukee itself.

Our reference, among other things, to MRRA legislative history, to language within the MRRA, and to current ICC and related decisional precedents mandates affirmance. Under these facts, the reorganization court correctly imposed protective labor conditions and the provisions within the collective bargaining agreements upon the Milwaukee estate alone, and acted properly in its refusal to impose such conditions upon the non-carrier purchasers.

A.

As background, we must briefly detail the statutory scheme and related ICC and reorganization court actions which resulted in this appeal. Section 5(a) of the MRRA empowers the reorganization court to authorize abandonment of Milwaukee rail lines pursuant to 11 U.S.C. § 1170 (Supp. III 1979). The court may also authorize service termination on lines to be abandoned, pending expiration of the time for appealing an abandonment order or the final determination of any such appeal. Section 5(a), 45 U.S.C. § 904(a). The court, in addition, is empowered to permit the sale or transfer of Milwaukee lines "to be used in continued rail operations," subject to ICC approval within the time limits fixed by the court, not to exceed 180 days. Sections 5(b)(1) and 5(b)(2), 45 U.S.C. §§ 904(b)(1) and 904(b)(2). Under either scheme, the reorganization court must impose upon the parties appropriate labor protective conditions to ensure protection in behalf of all employees adversely affected by the respective abandonment, sales, or other transactions. Sections 5(a)(1) and 5(b)(1). Under either section, the court must determine that employees are protected in accordance with provisions contained within 49 U.S.C. § 11347.

Pursuant to MRRA Section 5(a)(1), the reorganization court on February 29, 1980 granted the trustee's motion for authority to abandon and subsequently to sell the Milwaukee's non-core Metaline Falls and Port Angeles branch lines, the former being acquired by the Port of

Pend Oreille ("Port")[33] and the latter by the Seattle and North Coast Railroad Company ("SNC").[34] Order Nos. 297, 297A. The Port and the SNC were non-carrier entities who intended to either apply for ICC operating authority (in the case of SNC), or to contract with newly formed operators who would themselves apply for ICC operating authority (in the case of the Port.)[35]

By Order Nos. 281A and 281B, dated February 19, 1980 and March 10, 1980 respectively, the reorganization court authorized abandonment of certain Milwaukee lines with corresponding acquisition by the State of Wisconsin of several lines within its boundaries. The ICC, in response to a separately filed Wisconsin application, also approved the Wisconsin line acquisitions.[36]

The Wisconsin acquisitions, as the record indicates, were effected in order to secure ownership of certain Milwaukee properties after cessation of its service.[37] The ICC noted that Wisconsin did not propose to operate over any of the acquired land or track and concluded that service over the lines would not, in all likelihood,

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[33] The Port is a special district established by local referendum which is empowered to acquire rail lines for local service.

[34] The SNC proposed to render rail service over a portion of the previously embargoed lines between Port Angeles and Port Townsend, Washington.

[35] The Port has subsequently leased the line to the Pend Oreille Valley Railroad ("POV"). The POV, after ICC approval, currently renders service over the line pursuant to an operating agreement with the Port.

[36] *State of Wisconsin—Acquisition of Certain Lines of Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, Finance Docket No. 29237, Jan. 30, 1980, Feb. 28, 1980, *modified*, Aug. 4, 1980 ("*Wisconsin—Acquisition*").

[37] The State itself was empowered to acquire the properties due to a grant from the Wisconsin legislature. 1977 Wis. Laws, ch.29, § 1343, creating Wis. Stat. § 195.199, later renumbered by 1979 Wis. Laws, ch.34, § 1018, as Wis. Stat. § 85.09.

continue absent State acquisition.[38] In fact, the Wisconsin legislature envisioned that the State would merely own the lines. Actual operation over the lines by local municipalities, counties, or their selected operators would only occur upon individual application and related ICC approval.

RLEA requested, pursuant to MRRA Section 5(b), that the reorganization court impose upon the prospective non-carrier purchasers the following conditions: (1) negotiation with Milwaukee employee representatives for the reassignment of the work force; (2) employment of those employees so selected subject to Milwaukee rates of pay, rules and working conditions; and (3) responsibility for the payment of all employee Appendix B protective claims.[39] The reorganization court, in authorizing the abandonments and acquisitions at bar, rejected RLEA's motion and reasoning that Section 5(b) mandated imposition of statutory and contractual labor protective conditions upon the prospective non-carrier purchasers instead of upon the Milwaukee estate. The court's rejection was grounded upon cognizance that sales to non-carriers for rail use had been traditionally treated as abandonments followed by subsequent ICC application for operating authority, with the entire labor protection expense imposed solely upon the abandoning carrier. Collective bargaining agreements also were not to be imposed upon the new non-carrier purchasers. Order Nos. 297, 281C.[40] The court, in reaching its deci-

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[38] *Wisconsin—Acquisition, supra*, note 36.

[39] The Port, POV, SNC, and Wisconsin were permitted to intervene before the reorganization court in support of the trustee's opposition to RLEA's motion.

[40] Order No. 297 concerns acquisitions by the Port and the SNC and is the subject of appeal No. 80-1348. Order No. 281C relates to the Wisconsin acquisitions and is the subject of appeal No. 80-1546. The Port, POV, SNC, and Wisconsin are all intervening appellees in these appeals. The State of South Dakota is also an intervening appellee herein. South Dakota is currently implementing a program similar to the rail service continuation program effected by Wisconsin.

sion, viewed the transactions as abandonments and subsequent acquisitions by non-carriers which either would obtain operating authority directly (the SNC), *might* seek to arrange for third parties to obtain ICC operating authority (the Port), or would do nothing to aid its operators in obtaining ICC authority (Wisconsin).

It is clear that MRRA Section 5(a) applies to court-approved abandonments of Milwaukee lines. It is clear that Section 5(b) is applicable to the sale or transfer of Milwaukee lines to be used in continued rail operations, subject to ICC approval. Section 5(b) (2), in addition, permits a "purchasing carrier" of a line to be used in continued operations to operate interim service as a common carrier over Milwaukee lines. At issue therefore, is which provision is directly applicable where a Milwaukee line abandonment is followed by acquisition by a non-carrier entity. Neither subsection specifically mentions abandonments followed by acquisitions by non-carriers who intend to operate, to arrange for eventual operation, or to serve as the liaison to the trustee and the ICC. The trustee and intervenors-appellees contend that Section 5(a) should govern this statutory void. RLEA, on the other hand, avers that the abandonments and acquisitions should be effected pursuant to Section 5(b), thus imposing labor protection obligations and Milwaukee collective bargaining provisions upon the purchasers. We hold that such abandonments and related acquisitions were properly completed under Section 5(a). Accordingly, labor protection benefits were correctly imposed on the Milwaukee estate alone and the non-carriers were not subject to the terms of Milwaukee collective bargaining agreements.

B.

We first address the propriety of the reorganization court's imposition of protective conditions upon the trustee rather than upon the acquiring non-carriers. MRRA Section 5(c), 45 U.S.C. § 904(c) states that "[n]othing in this section shall be deemed to affect the priorities or timing of payment of employee protection

which might have existed in the absence of this chapter."[41] Accordingly, our task is to ascertain which party, under existing law aside from MRRA, is to bear the expense of labor protection upon the occurrence of line abandonment and subsequent acquisition by a non-carrier.[42]

Under the Interstate Commerce Act, Pub. L. No. 95-473, 49 U.S.C. § 10101 *et seq.* (Supp. III 1979), a distinction is made between non-carrier acquisitions and other purchase transactions which involve two or more existing rail carriers. Such non-carrier acquisitions and the operating authority which follows and which results from abandonment or other line extension is now governed by 49 U.S.C. §§ 10901 and 10903, formerly Section 1(18)-1(20), 49 U.S.C. §§ 1(18)-1(20) (repealed 1978).[43] Transactions involving transfers or sales between two or more existing carriers, normally termed unifications, are governed by 49 U.S.C. § 11343, formerly Section 5(2), 49 U.S.C. § 5(2) (repealed 1978). [44] *People ex rel. Illinois v. United States*, 604 F.2d 519, 524-25 (7th

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[41] The Conference Report concerning Section 5 is in complete accord:

> The Conferees intend that the granting of authority to the Bankruptcy Court to order sales and abandonments not change existing law with respect to employee protection. The employees' right to protection shall be required by the Court to the same extent that it would have been provided by Interstate Commerce Commission under Section 11347 of the Interstate Commerce Act.

H.R. Conf. Rep. No. 96-583, 96th Cong., 1st Sess. 17, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 1749.

[42] We address RLEA's argument concerning imposition of collective bargaining agreements on non-carriers in Section IIIB of this opinion, *infra.*

[43] Section 10903 concerns the abandonment of the line while Section 10901 is related to the later acquisition or operation of the line. *See Matter of New York, Susquehanna & Western Railroad Co.*, 504 F. Supp. 851 (D.N.J. 1980).

[44] Examples of unifications include railroad mergers and consolidations.

Cir. 1979), *cert. denied*, 445 U.S. 951 (1980) (and the cases cited therein); *North Western Employees Transportation Corp.—Purchase*, 342 I.C.C. 58, 65 (1972).[45] Section 10901 applies to the new acquisitions by non-carriers *regardless* of whether or not a corresponding line abandonment application has been filed by the existing operating carrier or has been denied. *People ex rel. Illinois v. United States, supra*, 604 F.2d at 524. This is so, because this Section and its predecessor are essentially directed at the transportation-oriented activities of a *single* rail carrier or non-carrier applicant, whereas the focus in Section 11343 proceedings is upon the potential effect of multi-carrier transactions. *Id.*, 604 F.2d at 525-26. *See Okmulgee Northern Railroad Co.—Abandonment*, 320 I.C.C. 637, 639-40 (1964).

Therefore, under prior law, when a non-carrier acquires a line of another carrier—either subsequent to an abandonment or otherwise, the transaction is completed under 49 U.S.C. § 10901. Under this section, responsibility for labor protective benefit payments rests, if at all, with the vendor/abandoning carrier and is *not* imposed in the absence of circumstances not present here,[46] upon the acquiring

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[45] *See Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions*, 363 I.C.C. 132 (1980) ("*Common Carrier*"); *Tennessee Central Railway Co.—Abandonment*, 334 I.C.C. 235, 245-46 (1969).

[46] Two of the decisions cited by RLEA for the proposition that an acquiring non-carrier is expressly required to pay labor protective benefits are inapposite. In *State of Oklahoma ex rel. Dep't of Highways—Abandonment*, 324 I.C.C. 666 (1965), the ICC exercised its discretion by imposing the payments upon the acquiring non-carrier—the State. This was effected where the State itself sought the line abandonment of the carrier, preliminary to eminent domain proceedings. The ICC also noted that since the acquisition was not accomplished as "the usual case of a railroad seeking to rid itself of a deficient branch operation [accordingly,] it would be unfair to place the burden of such protection on the [abandoning carrier]." *Id.*, at 679. As the State and its citizenry were the principal beneficiaries, it was only reasonable that the expense of labor protection be borne by the State. *Id.*

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non-carrier.[47] As the ICC recently stated in the proceeding to approve the SNC acquisition and operation of the Port Angeles line:

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[46] *continued*

In *Central Railroad Co. of New Jersey—Abandonment*, 342 I.C.C. 227, 301-02 (1972), the acquiring carrier of a line of a railroad in reorganization was required to comply with only certain minor obligations including hiring preferences and the preservation of seniority rights. The clear bulk of all major benefits were, in keeping with longstanding tradition, imposed upon the abandoning carrier. Thus, this decision cannot be interpreted as requiring an acquiring non-carrier to undertake the majority if not all of the labor protective obligations.

[47] RLEA, at this juncture, makes much of the issue of ICC discretion to impose benefit payment upon either the abandoning carrier or upon the new carrier in the event of unification. Under Section 11343, *et seq.*, imposition of labor benefit obligations is mandatory, while under Sections 10901 and 10903 (and their predecessors), prior to 1976, imposition had been discretionary with the ICC. *I.C.C. v. RLEA*, 315 U.S. 373, 380 (1942); *People ex rel. Illinois v. United States*, *supra*, 604 F.2d at 528-29; *Okmulgee Northern Railway Co.—Abandonment*, *supra*, 320 I.C.C. at 645. *See Matter of New York, Susquehanna & Western Railroad Co.*, *supra*, 504 F.Supp. at 856-62. The issue of whether imposition is now mandatory as RLEA argues, subsequent to the 1976 amendment to the predecessor to Section 10903 by the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 802, need not be decided here.

RLEA implies that unless the acquiring non-carriers are responsible for benefit payment, the requirements of 49 U.S.C. § 11347 will not be met, as benefit imposition will otherwise be "meaningless" if imposed upon the abandoning carrier. As we determined earlier in Part I of this opinion, *supra*, the benefits which have in fact been imposed upon the Milwaukee alone, are at least as protective of the interests of the employees as those required under Section 11347. Thus, the requirements of *both* Sections 5(a) and 5(b) are satisfied in this regard. We note that the trustee has explicitly stated that the estate, in the absence of a total liquidation, *will be responsible* for the complete array of benefit payment determined by the reorganization court to be owing.

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> We find it unnecessary to determine whether section 5(b) as opposed to section 5(a) of the MRRA should apply to this proceeding. We believe that even were the application brought pursuant to section 5(b) that we would not be required to impose labor protection conditions upon S&NC. The imposition of labor protection in a transaction proposed under 49 U.S.C. § 10901 is discretionary. In numerous proceedings in which a non-carrier sought to acquire and operate a line of railroad not previously abandoned, the Commission has determined that 49 U.S.C. § 10901, rather than 49 U.S.C. § 11343 (which carries mandatory labor protection), applies. When finding employee protection appropriate in a proceeding under 49 U.S.C. § 10901, the Commission has usually imposed it on (or required that its costs be borne by) the selling rail carrier and not the non-carrier purchaser.

Seattle & North Coast Railroad Co.—Acquisition and Operation, Finance Docket No. 29158F, July 22, 1980, at 10.

Moreover, when an abandonment application has been granted or previously dismissed upon a procedural ground,[48] employee protection has consistently been imposed solely upon the abandoning carrier, whether or not a later acquisition followed.[49] *People ex rel. Illinois v. United States, supra*, 604 F.2d at 525, 526-28 (and the citations therein). Sales and transfers of lines to existing carriers are alternatively treated as unifications, and

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[47] *continued*

Therefore, the discretion issue is a red herring, as the required Section 11347 benefit levels will in fact be paid, regardless of the ICC's discretion to mandate their payment.

[48] *See Cadillac & Lake City Railway Co.—Acquisition and Operation*, 320 I.C.C. 716, 718-20 (1964).

[49] In fact, in both types of non-unification transactions before us—abandonments and abandonments followed by acquisitions, the ICC has, in most circumstances, imposed responsibility for protective conditions upon the abandoning carrier.

employee protection responsibility *may* be allocated to both carriers. 49 U.S.C. §§ 11343-11350.

ICC imposition of benefit payments upon the abandoning carrier alone, in non-carrier acquisitions of abandoned lines, is grounded upon the desire to address the adverse consequences incurred by the carrier's employees which are a direct result of the abandonment. It is the carrier's cessation of operations, not the non-carrier vendee's acquisition which adversely affects the employees. *Seattle & North Coast Railroad Co.—Acquisition and Operation*, Finance Docket No. 29158F, July 22, 1980, at 10 (*"SNC—Acquisition and Operation"*). Here, the abandoning carrier itself reaps the significant benefit in the form of savings realized by the discontinuance of uneconomic and cumbersome rail service, and is therefore the primary beneficiary when relieved of its duty and costs of operation. *Id. See I.C.C. v. RLEA, supra*, 315 U.S. at 373. No related benefit is discernable which flows to the acquiring non-carriers as a result of the Milwaukee abandonments at issue. Therefore, there is no justification in imposing such a cumbersome and potentially devastating burden upon them. *Tennessee Central Railway Co.—Abandonment, supra*, 334 I.C.C. at 245-46.

In addition, we are mindful that placing responsibility for benefit payments upon the abandoning carrier alone in instances where the line is eventually acquired by a non-carrier advances the need for continued rail service over the line. This imposition protects as well as assists the new operators of these new business enterprises in their efforts to make a going business over lines which have previously been operationally uneconomical.[50] *Wis-*

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[50] As the ICC has stated:

> [I]n order to maintain a favorable revenue-to-cost ratio, the expenses of these new carriers must be kept to a minimum. Thus, if we were to establish a general policy of imposing conditions on all new operators, new enterprises would be discouraged from starting up. The result would be even more railroad employees out of work.

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consin—Acquisition, supra note 36, at 2; *Common Carrier, supra*, 363 I.C.C. at 136; *Okmulgee Northern Railway Co.—Abandonment, supra*, 320 I.C.C. at 639. The burden upon the new operator, upon commencement of line operation, will be great enough without the additional costs of labor protection. *See Durango and Silverton Narrow Gauge Railroad Co.—Acquisition and Operation*, 363 I.C.C. 292 (1979).

Since it is evident that the acquisitions by the Port, SNC and Wisconsin respectively are preceded by Milwaukee abandonments, the above-detailed policies are especially applicable here. Thus, in the absence of the MRRA, the obligation for benefit payment would rest solely upon the Milwaukee estate. It follows therefore, that since the MRRA itself mandates that nothing within the Act affect traditional priorities or timing of payment of employee protection, the estate is obliged for total benefit payment.

This conclusion is also supported by reference to the specific language within the MRRA. First, Section 5(a), as mentioned, mandates the reorganization court when authorizing *any* abandonment, to require *the carrier* to bear total labor protection responsibility. If the Milwaukee transactions are in fact classifiable as abandonments, then Section 5(a) and *not* Section 5(b) is applicable. It is well settled that line abandonment by a rail carrier is effected by a voluntary permanent or indefinite cessation or discontinuance of line operations. *Smith v. Hoboken Railroad, Warehouse & Steamship Connecting Co.*, 328 U.S. 123, 130 (1946); *Matter of New York, Susquehanna & Western Railroad Co., supra*, 504 F. Supp. at 856 (and the cases cited therein) (finding the analogue of Section 5(a)—MRRA Section 17(a), 45 U.S.C. § 914(a), applicable to the abandonment at issue there); *Matter of Valuation Proceedings Under §§ 303(c) and 306 of the Regional Rail Reorganization Act*, 439 F. Supp. 1351, 1370 (Special Rail Reorganization Court

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[50] *continued*

Wisconsin—Acquisition, supra, note 36, at 2. *Accord, SNC—Acquisition and Operation, supra*, at 11; *Tennessee Central Railway Co.—Abandonment, supra*, 334 I.C.C. at 246.

1977) (Friendly, J.). Thus, in the context of these transactions, it is clear that the Section 5(a) abandonment procedure is in effect and not that utilized for a sale or transfer. *See Matter of New York, Susquehanna & Western Railroad Co., supra*, 504 F. Supp. at 856. Here, as the reorganization court found, employees will be severed from their jobs with the same benefits as accorded to employees on lines where service is completely terminated.

Second, Section 5(b)(3) permits "the purchasing carrier" to operate interim service as a common carrier pending final ICC review, and also permits preliminary line sale or transfer to "another rail carrier." Further, MRRA Section 4, 45 U.S.C. § 903 (Supp. III 1979), provides for sales by the trustee to "another rail carrier *or any other person* . . . " (emphasis added). Yet Congress was careful under Section 5(b)(3) only to permit another rail carrier to operate interim service. If Congress had desired non-carriers to operate interim service, it could have so indicated. In the absence of such an expression, we interpret Section 5(b) as applicable only to *existing* carriers, and thus inapplicable to non-carriers.[51] Hence, the acquisitions at issue here may not be completed utilizing Section 5(b).[52]

To the contrary, RLEA argues that Section 5(b) governs *any and all* sales of former Milwaukee lines to be used in continued rail operations and accordingly, *all* labor protection must be imposed on the acquiring non-carrier. Here, RLEA submits that Congress sought to change existing law to except Milwaukee abandonments

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[51] In reaching this conclusion, we are especially mindful of the maxims of statutory construction which we utilized earlier and which are of equal use and import here. *See* discussion corresponding to notes 12-20, *supra*.

[52] Accordingly, we reject RLEA's argument that the terms within Section 5(b)(3) serve only to limit the reach of the interim authority and preliminary approval provisions of Section 5(b)(3) itself. This narrow construction is violative, *inter alia*, of our duty to interpret a statute both consistently with its other provisions and so as to render each section completely effective. *See* notes 18 and 20, *supra*.

and acquisitions from the normal procedures by distinguishing between "abandonments" and "sales and transfers." Congress, RLEA says, intended that purchases by non-carriers of abandoned Milwaukee lines be subject to the same conditions usually reserved for unification transactions. In support, RLEA avers that Section 5(b) applies to these acquisitions because it permits the court to: (1) expedite the final transfer of abandoned lines by imposing a time limit for ICC review; (2) expedite review of any ICC provision by providing for limited judicial review; and (3) permit the court to allow acquiring carriers to operate interim service over the line pending final ICC action. Thus, RLEA contends that since Congress established an expedited method to be utilized in sales of lines, this procedure *must* be employed in each of the transactions at bar. We cannot agree.

Examination of the effect of Section 5 upon Section 77o of the Bankruptcy Act, 11 U.S.C. § 205(o) (repealed 1978), as well as reference to the MRRA itself and to the previously detailed maxims of statutory construction compels us to conclude that RLEA's argument is without merit. RLEA, in addition, is unable to cite any relevant statutory or decisional authority for its position. We begin by noting that RLEA admits that acceptance of its argument concerning the scope and impact of Section 5(b) would "extensively modify" existing law. This position simply cannot stand and is violative of the "status quo" mandates which clearly constrain our interpretation of the reach of Section 5(b).[53] Further, it is fundamental error and is contrary to decisional precedent to determine, as RLEA would have us do, that Section 5(a) is rendered irrelevant when an abandonment is followed by a sale to a non-carrier. The

[53] It would be surprising for Congress to restructure such a long-standing practice in so subtle a fashion, as a new statute will not be read as even partially modifying a prior statute in the absence of a positive repugnancy between the new provisions and those of the old. *Regional Rail Reorganization Cases*, 419 U.S. 102, 133-34 (1974). Given our interpretation of the respective provisions, we are hard pressed to find any repugnancy whatsoever.

argument misreads Section 5(a) as imposing responsibility for the conditions upon the abandoning carrier only in the absence of a subsequent sale. However, Section 5(a) mandates imposition upon the abandoning carrier regardless of whether any subsequent sale or transfer is effected.[54]

In any event, Section 5(b) is not as efficacious as RLEA would have us believe. Section 5(b) only requires the reorganization court to "provide a fair arrangement" consistent with the requisite protective levels under 49 U.S.C. § 11347. In *no instance*, therefore would Section 5(b) automatically extend responsibility for protective conditions to the non-carrier purchasers. Even if Section 5(b) were applicable, the court is empowered to, and realistically could limit the responsibility to the Milwaukee estate alone. At best, the "fair arrangement" appeals to the reasoned discretion of the reorganization court in effecting the diverse Congressional objectives expressed within the MRRA.

Furthermore, RLEA's interpretation would defeat the intent and purpose of Congress in facilitating the Milwaukee reorganization and would frustrate the primary objectives sought to be advanced within the MRRA.[55] These objectives include expeditious and

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[54] As the reorganization court noted, Order No. 297 at 4-5:

> Sections 5(a) and 5(b) of the M.R.R.A. were obviously intended to govern two different types of transactions. Section 5(a) applies to a simple abandonment "pursuant to § 1170 of Title 11," and § 5(b) applies to the "sale or transfer of a line of the Milwaukee Railroad to be used in continued rail operations, subject to the approval of the Commission . . ." Section 5(a) must be taken to apply to sales to any non-carrier, since the bankrupt railroad does not simply abandon its abandonments.

[55] RLEA's interpretation is also inconsistent with several other provisions within the MRRA. As we determined in Part II above, traditional benefit payment must be deferred until a later date and is payable, if at all, as a claim upon the estate. We additionally noted that the optional benefit scheme requires guaranteed prompt payments which are currently owing as an administrative expense imposed upon the

(Footnote continued on following page)

successful reorganization of the Milwaukee, preservation of essential rail service to the maximum extent possible, and avoidance of potential unemployment as well as damage to the regional and national economy. MRRA Section 2(b), 45 U.S.C. § 901(b) (Supp. III 1979). The record indicates that if RLEA is correct in its view of Section 5(b)'s applicability, the acquisitions at bar would not have occurred, as the states and other acquiring non-carrier entities would be required to divert scarce investment and start-up funds to finance employee benefits, wage rates, and other conditions without regard to the extent the conditions are mandated by existing market conditions. If the acquiring entities are burdened with these requirements, future rail service over many of the lines, as the record reveals, would be rendered wholly unfeasible.

These new entities *must* be permitted to tailor service to the respective demands of both shippers and passengers, and this goal is only achievable without imposition of the responsibility for the protective obligations. It is extremely doubtful whether any new operator would commence operations, absent significant state, local, or

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[55] *continued*

Milwaukee estate. We are hard-pressed to comprehend, given these two holdings, how benefit payment could possibly be imposed upon a non-carrier or its operator. Imposition of traditional benefit payment upon the new operators, upon completion of the reorganization effort, which might not occur for some time now, would work a severe hardship on the new operators; one which Congress could not have intended.

Moreover, prompt accelerated payment under the optional scheme could not be achieved, as the payments would not commence until the new carrier requested initial ICC acquisition and operating authority. Here, we envision a Milwaukee line abandonment with immediate benefit imposition upon the estate and six months later a non-carrier seeking line acquisition. If the obligations were imposed upon the new carrier or operator, either the optional benefit payment would not have been promptly completed, or the traditional benefits would be paid at a later date and out of funds not originally contemplated for such a purpose.

federal subsidization, if it would be required to operate subject to the identical labor benefits and conditions imposed upon the Milwaukee. The newly formed short line carriers, as the record reveals, simply cannot afford to assume similar responsibilities for labor protection as can a national carrier like the Milwaukee.

C.

We now turn to the question of the propriety of the reorganization court's refusal to impose terms of Milwaukee collective bargaining agreements—including wage rates, rules, and working conditions upon the acquiring non-carriers or their respective operators. RLEA urges that former Milwaukee employees are entitled to carry with them their entire collective bargaining rights and agreements, if and when they commence employment with the new operating carriers. We find an absence of pertinent statutory language or decisional authority which would mandate such a result. Thus, we hold that the provisions within the agreements need not be imposed upon the acquiring non-carriers or their operators as the former Milwaukee employees secure new employment with them.

We begin by noting the nearly unanimous rule of traditional federal labor law, that absent a near identity of employers and perfect continuity of a single enterprise, a court may not impose the substantive provisions of a collective bargaining agreement between a union and the predecessor employer upon a nonconsenting successor employer. *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 264-65 (1974); *Golden State Bottling Co., Inc. v. N.L.R.B.*, 414 U.S. 168, 181-85 (1973); *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272, 283-84 (1972); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *Bartenders and Culinary Workers Union, Local 340 v. Howard Johnson Co.*, 535 F.2d 1160, 1162 (9th Cir. 1976) (and the cases and authorities cited therein).

Reference to the particular facts of each acquisition at issue[56] in view of the totality of the circumstances,[57] compels us to conclude that non-carriers and the next operators are not successor employers within the context of the federal labor law. Neither the required degree of employer identity[58] nor the substantial continuity of the business operation[59] are present here. Thus, the terms of

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[56] *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, supra,* 417 U.S. at 262, 264; *Shaffer v. Mitchell Transport, Inc.,* 635 F.2d 261, 266 and n.10 (3d Cir. 1980). *See Local 115 Joint Board Nursing Home and Hospital Employees, Florida Division v. B & K Investments, Inc.,* 436 F. Supp. 1203, 1208-09 (S.D. Fla. 1977).

[57] *International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC v. N.L.R.B.,* 604 F.2d 689, 694 (D.C. Cir. 1979).

[58] The record evidence demonstrates that the Milwaukee and the Port, POV, SNC, and Wisconsin are entirely separate entities, and these new carriers or their operators have selected their own work forces.

[59] *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, supra,* 417 U.S. at 258-59. *See John Wiley & Sons, Inc. v. Livingston, supra,* 376 U.S. at 551; *Saks & Co. v. N.L.R.B.,* 634 F.2d 681, 687 (2d Cir. 1980); *Zim's Foodliner, Inc. v. N.L.R.B.,* 495 F.2d 1131, 1140-41 (7th Cir.), *cert. denied,* 419 U.S. 838 (1974).

It is hard to imagine a clearer instance of a lack of substantial continuity of business operations than is present here. The Milwaukee—a large national carrier—has abandoned specific non-core lines. Some of these lines were acquired under specific ICC and reorganization procedures which call for local line operation by small local carriers whose primary purpose is the preservation of as much of the service to local shippers and passengers as is practicable. The required continuity is lacking where there has been an abandonment, a hiatus of operation, and only then a commencement of operation by a new carrier who initially acquired the line as a non-carrier entity. In other words, the rail operations are totally altered after the transfer of ownership. In addition, there is no substantial continuity of the work force here, as the record reveals that a low percentage of the former Milwaukee employees are employed with the new operators.

the Milwaukee collective bargaining agreements may not be imposed upon these parties who have either expressly or impliedly declined to voluntarily assume the obligations contained within the agreements.[60]

RLEA argues that these labor cases are inapplicable and of no effect in these appeals because the cases at bar arise under the Railway Labor Act. We cannot agree. It is the *policies* enunciated in these decisions which guide us in resolution of this issue of first impression.[61] These policies include those stressed by the *Burns* Court: (1) freedom of contract under federal labor law (as Burns had not agreed to assume its predecessor's obligations); (2) inhibition of the free flow of capital if the new employers were to be bound to pre-existing agreements; and (3) freedom of the successor to effect substantial alterations in the operation of the enterprise. *N.L.R.B. v. Burns International Security Services, Inc., supra*, 406 U.S. at 280, 287-88. As the Court stated, 406 U.S. at 287-88:

> [H]olding either the union or the new employer bound to the substantive terms of an old collective-

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[60] Application of the many diverse factors utilized by courts to ascertain continuity of employer identity in the business enterprises does not alter our conclusion. *See N.L.R.B. v. Tricor Products, Inc.*, 636 F.2d 266, 269-71 (10th Cir. 1980); *Service, Hospital, Nursing Home and Public Employees Union Local 47 v. Cleveland Tower Hotel, Inc.*, 606 F.2d 684, 687-88 (6th Cir. 1979); *E.E.O.C. v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974) (and the cases cited therein).

[61] Other circuits have also reviewed these cases and have been guided by the policies there in expansion of their impact into areas beyond the confines of traditional labor law. *See, e.g., E.E.O.C. v. MacMillan Bloedel Containers, Inc., supra*, 503 F.2d at 1086 (where the court ruled that a corporate successor may be held liable for unfair employment practices of a predecessor corporation); *Howard v. Penn Central Transportation Co.*, 87 F.R.D. 342 (N.D. Ohio 1980) (where the court found that a successor company could not be held liable for monetary relief arising out of alleged employment discrimination by a reorganized railroad company).

> bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make for a large or economically successful firm. The congressional policy manifest in the [National Labor Relations] Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.

We recognize that Congress has occasionally evinced a desire to bind new operators to existing bargaining agreements of their employees. *See e.g.*, Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, *as amended*, 45 U.S.C. §§ 772(b), 774 (1976 and Supp. III 1979) (Conrail and United States Railway Association bound by prior agreements); Rail Passenger Service Act of 1970, Pub. L. No. 91-518, *as amended*, 45 U.S.C. § 565 (1976 and Supp. III 1979) (Amtrak and the National Railroad Passenger Corp. also bound); Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 49 U.S.C. § 1609(c) (1976 and Supp. III 1979) (privately employed employees transferred to state governmental employment, in circumstances not present here, were protected). These acts indicate that where Congress desires successor employers to undertake bargaining obligations of predecessor employers, the intent is explicit and is clearly evident from the pertinent statute itself. Here, evidence of a similar desire is totally lacking within the MRRA or other pertinent statutes.

Such a desire may not reasonably be implied, contrary to the assertions of RLEA.[62]

IV.

For the foregoing reasons,[63] the orders of the reorganization court are AFFIRMED. Costs to the Trustee.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[62] There is no legislative history on point. However, Section 122 of the Rock Island Transition and Employee Assistance Act, Pub. L. No. 96-254, 45 U.S.C. § 1017 (Supp. III 1979), which, *inter alia*, grants the ICC authority to permit voluntary carrier use of the tracks and facilities of the Milwaukee contains relevant history:

> "The conferees wish to make clear that paragraph (b) [which mandates that Milwaukee employees be used during the pendency of the temporary operating approval] is not intended to change existing Commission policy nor to require newly formed carriers to assume collective bargaining obligations or union representation."

H. R. Rep. No. 96-1041, 96th Cong., 2d Sess. 34, *reprinted in*, [1980] U.S. CODE CONG. & AD. NEWS 1195.

[63] Matters not expressly discussed herein have nevertheless been duly considered and have been determined to be meritless.

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APPENDIX C

APPEAL NO. 80-1347

In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.

APPEAL OF

Railway Labor Executives' Association

ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION AND RELATED MATERIALS

Appendix C-1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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77 B 8999

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY,

Debtor.

In Proceedings For The Reorganization Of A Railroad

ORDER No. 276-B

In Order No. 276, this court appointed Milton H. Gray, Esq., as special master to conduct hearings and report his recommendations with respect to the Trustee's applications to abandon 18 branch lines in various states. The special master's report was filed in this court on February 20, 1980, recommending that all applications be granted, as had been recommended by the Interstate Commerce Commission. The parties were given until February 25, 1980 to file objections to his report and recommendations.

Harris Trust and Savings Bank, the First National Bank of Chicago, and the Girard Bank, as indenture trustees, filed a joint objection, re-stating their contention that this court should reserve ruling on any labor protective conditions required by Section 5 of the M.R.R.A., at least until the I.C.C. renders its decision on the pending reorganization proposals. The Railway Labor Executives' Association filed, on February 26, 1980, an objection to the special master's report, on the ground that his recommendations fail to satisfy the minimum labor protection standards of 49 U.S.C. §11347, as required by Section 5(a)(1) of the M.R.R.A., and on the further ground that immediate payment of those benefits is required at the time of abandonment.

Master Gray recommended that specified labor protection conditions be imposed upon abandonment, but that their payment be deferred pending a possible reorganization. The Trustee has filed a short statement concurring in the special master's recommendations, on the ground that they properly reconcile the interests of labor to the Congressional policy that the Milwaukee's restructuring proceed. We agree with the special master and the Trustee that this court must decline both of the extremes sought by the indenture trustees and the R.L.E.A. The history of this proceeding and the governing statute demonstrate our reasons.

The position taken by the indenture trustees conflicts with the express language of Section 5(a)(1) of the M.R.R.A., which mandates that this court require the carrier to provide a "fair arrangement" for labor protection in authorizing any abandonment pursuant to this section. Although the labor protection settlement agreement approved in Order No. 286 will provide immediately available benefits, affected employees are entitled to make an informed choice between their benefits under that agreement and those required by §11347 of Title 49.

On the other hand, the history of this proceeding refutes R.L.E.A.'s contention that any labor protection benefits must actually be paid commencing with abandonment. If this were made a precondition to the approval of abandonment petitions under Section 5(a)(1), it would cripple or perhaps destroy the debtor's financial ability to continue operations. Congress' language requires only an "arrangement," not a payment which would result in favoring the earliest claimants to the detriment of all other interests.

In the instances of retroactive wage increases under collective bargaining agreements, this court has directed that immediate payments not be made as a cost of administration. (Orders No. 193, 193A.) This court has similarly dealt with state property taxes (e.g. Order No. 263). While the Seventh Circuit's holding *In the Matter of Chicago, Rock Island and Pacific R. Co.*, 537 F.2d 906 (7th Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977), binds this court to a different conclusion with respect to per diem accounts due (e.g. Order No. 234A), this decision has been limited to its special cir-

cumstances (Order No. 145). Likewise, the cost of capital represented by the Milwaukee's funded or fixed debt remains unpaid (Order No. 1, par. 4).

R.L.E.A. also objects to the special master's recommendation that would permit the Trustee to consummate the proposed abandonments after giving ten days' notice, regardless of whether an implementing agreement has been reached between the Trustee and the collective bargaining representatives. Master Gray's report recommends that, although the notice period be shortened to ten days, the labor protection arrangement should provide that any employee improperly displaced, dismissed, or reassigned prior to completion of such an agreement be made whole for any losses suffered thereby (Report at 35.)

Master Gray obviously intended that a condition be imposed to guarantee that no employee should be adversely affected simply because service is abandoned prior to negotiation of an implementing agreement *(ibid.)*, yet such a condition is not specified in Article I, section 4 or elsewhere in his proposed labor protection conditions (Appendix B). R.L.E.A. appears to concede (at 5) that such a condition would alleviate the hardship of a shortened notice provision. See *Congress of Railway Unions* v. *Hodgson*, 326 F.Supp. 68, 76 (D. D.C. 1971).

We find, therefore, that Appendix B should be amended by the insertion of an appropriate clause as Article I, section 4(e). Since this particular matter has not been litigated here in detail, we will adopt the foregoing language, subject to modification for good cause shown:

> If the foregoing proceeding results in a binding agreement or decision with respect to application of the terms and conditions of this appendix, other than as provided by Railroad at the time of the transaction, the agreement or decision shall apply to all employees who were affected by the transaction at any time.

We also find and conclude that the above provision is an adequate alternative to requiring an implementation agreement as a precondition to the initiation of any action directed toward abandonment, in view of Congress' intent to expedite such transactions by

Section 5(a) of the M.R.R.A. (cf. *New York Dock Railway et al.* v. *United States*, 609 F.2d 83, 94 (2d Cir. 1979)).

The special master has also received and delivered to this court a letter from counsel for Lear Siegler, Inc. dated February 22, 1980. That company had previously objected to the proposed abandonment of the Trustee's branch line between Paralta and Hopkinton, Iowa (Report at 3, 12-13). Lear Siegler urges that service be continued on that branch line while a proposed purchase is negotiated. This request necessarily fails in light of this court's Order No. 290A, approving an embargo on this and other branch lines which the Trustee felt did not merit an additional expenditure of subordinated E.R.S.A. funds for one month while purchase offers are pursued.

To the extent not modified above, the special master's report and recommendations on the Trustee's applications for abandonment of 18 branch lines are affirmed and adopted by this court, and all objections are overruled.

SO ORDERED

/s/ THOMAS R. MCMILLEN
JUDGE, U.S. DISTRICT COURT

DATED: Feb. 29, 1980

Appendix C-2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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77 B 8999

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY,

Debtor.

In Proceedings For The Reorganization Of A Railroad

Order No. 276-C

(1) The Trustee is authorized to abandon each of the lines identified in Appendix A hereto;

(2) The Trustee is authorized to terminate service on each of the lines identified on Appendix A hereto ten (10) days after giving the notice required by Article I, Paragraph 4 of Appendix B to the Special Master's Report;

(3) The conditions contained in Appendix B to the Report of the Special Master dated February 20, 1980 are adopted for the protection of employees affected by the authorized abandonments, and Section 4(e) is included therein as specified in Order No. 276B;

(4) The Trustee is directed to establish a procedure for the filing of claims by employees for amounts due under that Appendix B;

(5) The Court reserves jurisdiction to determine the priority for paying claims under Appendix B at a future date and to determine the

rights of employees covered by Appendix B in the event of changed conditions in the consummation of the reorganization proceedings.

ENTER:

/s/ THOMAS R. MCMILLEN
JUDGE, U.S. DISTRICT COURT

Feb. 29, 1980

Appendix C-3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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77 B 8999

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY,

Debtor.

In Proceedings For The Reorganization Of A Railroad

REPORT OF SPECIAL MASTER, MILTON H. GRAY, INCLUDING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS, ON THE TRUSTEE'S APPLICATIONS FOR ABANDONMENT OF 18 BRANCH LINES

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[15]**III. Employee Protection**

The Trustee, the Indenture Trustees and the RLEA differ with respect to the protection of employees from the adverse effects of the abandonments. The arguments of the parties raise several complex issues of first impression, and the proper resolution of these issues requires an understanding of the statutory and historical framework in which they arise.

Section 5 of the MRRA mandates that "In authorizing any abandonment . . . the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of title 49 of the United States Code." Section 11347 provides that in cases involving acquisition of control of rail carriers, including consolidations and mergers, the Commission prescribe employee protection "at least as protective of the interests of employees . . . as the terms imposed [in such transactions] before February 5, 1976, and the terms established under Section 565 of title 45." The former clause refers to the protection conditions the Commission ordinarily prescribed in control cases prior to passage of the Railroad Revitalization and Regulatory Reform Act of 1976. The latter clause refers to the protection which was prescribed by the Secretary of Labor in connection with the conveyance of intercity passenger service to Amtrak under the Rail Passenger Service Act of 1970.

In *New York Dock Ry-Control-Brooklyn E.D.T.*, 354 ICC 399 (1978), *mod.* 360 ICC 60 (1979), the Commission established [16] what it viewed to be the minimum protection required by Section 11347 "in all usual proceedings" of the type involved in that case. On appeal, the Second Circuit affirmed the Commission's conclusion that the conditions prescribed in *New York Dock* constituted the minimum protection allowable under Section 11347. *New York Dock Railway* v. *United States*, ____ F.2d ____ (2nd Cir. November 7, 1979). It also noted, however, that "it is beyond challenge . . . the ICC may fashion employee protective conditions that are tailored to the special circumstances of individual cases."

At the same time as it resolved *New York Dock*, the Commission also decided *Oregon Short Line R.R. — Abandonment*, 360 ICC 91 (1979) *(Oregon Short Line III)*. *Oregon Short Line III* dealt with the employee protection conditions required in abandonment cases brought pursuant to Section 10903 of the Interstate Commerce Act. Section 10903, like Section 5 of the MRRA, mandates the imposition of conditions at least as protective to employees as those required by Section 11347, and the Commission concluded that Section 10903 necessitates prescription of conditions which are in substance identical to those established in *New York Dock*.

The protection prescribed in *New York Dock* and *Oregon Short Line* includes the following monetary benefits:

(a) To employees who suffer a reduction in earnings, a displacement allowance equal to the difference between pre- [17] transaction and post-transaction earnings for a period of six years.

(b) To employees who lose their positions, the choice of either (i) a monthly dismissal allowance equal to one twelfth of the employee's earnings during the last twelve months in which he was employed for a period of six years; or (ii) a lump sum separation allowance equal to 16½ months salary.

(c) Continuation of all fringe benefits for six years.

(d) Payment of moving expenses incurred as a result of job changes.

In addition, the *New York Dock* and *Oregon Short Line* conditions include certain nonmonetary requirements. The railroad must give its employees 90 days notice of the effective date of a proposed transaction. During this period, the railroad is required to negotiate, or establish through arbitration, an implementing agreement to provide for the assignment and selection of a combined work force. The railroad is precluded from consumating [*sic*] the proposed transaction until such an implementing agreement is established.

The RLEA contends that the *Oregon Short Line III* conditions must be imposed in connection with abandonments authorized pursuant to Section 5 of the MRRA because the foregoing authority establishes

that they are the minimum protective benefits required under 11347. RLEA further [18] argues that payments of *Oregon Short Line III* benefits must be made immediately because they are intended to alleviate hardships resulting from the abandonments. In RLEA's view, failure to make prompt payment would render any protection prescribed both illusory and invalid.

The Special Master agrees with RLEA that Section 5 of the MRRA requires the imposition of protective conditions for employees at the time of Court approval of an abandonment under that Section. He disagrees, however, with RLEA's contention that payments pursuant to that protection must be made as liability accrues and that the protection prescribed must be, in all respects, identical to *Oregon Short Line III* protection.

The conclusion that the Milwaukee need not pay labor protection as it accrues rests on three independent grounds. A holding that immediate payment is required would be contrary to the Congressional scheme for reorganization of the Milwaukee established by the MRRA, might preclude the reorganization of the Milwaukee and thereby frustrate the purposes of Section 77 of the Bankruptcy Act, and would require a premature determination of the priority of the Milwaukee's labor protection obligations. Each of these considerations dictates that payment of labor protection claims await final consumation [*sic*] of a reorganization plan.

The RLEA's position with respect to payment of labor protection is at odds with the purpose and scheme of the [19] MRRA. That Act represents, in essence, a compromise between the Trustee, railway labor, and certain interests who seek continued operation of the Milwaukee's Pacific Coast Extension. The compromise involved the adoption of a scheme for the reorganization of the Milwaukee in which the availability of rapid abandonment authority and the potential for a compromise resolution of labor protection claims arising from such abandonments were important elements. A conclusion that Section 5 of the MRRA requires immediate payment of labor protection liabilities would preclude the potential compromise of labor protection claims which the MRRA was intended to facilitate.

The MRRA was passed in direct response to decisions by the Court of Appeals and by the Reorganization Court authorizing the Trustee to cease operation over 70 percent of its line. Those decisions were premised on the conclusion that the Trustee did not have, and could not properly be allowed to borrow, the funds necessary to operate its entire system. The portions of the Milwaukee System to be embargoed included all trackage west of Miles City, Montana, *i.e.* the Milwaukee's Pacific Coast Extension.

Both railway labor and those interests who favored continued operation of the Pacific Coast Extension believed that the embargo would have serious adverse consequences. Railway labor envisioned the loss of many jobs without [20] any provision for the protection of employees who might suffer as a consequence. The West Coast interests believed that cessation of service on the Pacific Coast Extension would result in the loss of the Milwaukee's Pacific Extension employees and the erosion of its Pacific Extension traffic base. These circumstances might preclude adoption of their proposal to reorganize the Milwaukee as a transcontinental carrier.

Although the embargo promised alleviation of the cash drain which was rapidly depleting the Milwaukee's assets, major obstacles remained in the path of the Trustee's reorganization plan. The success of that plan was dependent upon the Trustee's ability to reduce the Milwaukee's system by abandoning unprofitable lines, and to rehabilitate rapidly the remaining core lines with funds obtained through the sale of the assets freed by the abandonments. To sell these assets, the Trustee was required to obtain abandonment approval from the ICC. ICC abandonment proceedings were notoriously slow, and the ICC traditionally prescribed burdensome labor protection conditions when approval was granted. These labor protection conditions would impose a financial obligation upon the railroad in an amount of approximately $350,000,000. Such a financial obligation would destroy any possibility of reorganizing the Milwaukee.

The MRRA represents a compromise intended to satisfy the perceived needs of all three of the interests involved, [21] and its passage was supported by each of them on that basis. It required continued operation of the Pacific Coast Extension for a limited period, and

provided subordinated federal financing for such operations. During the limited period, the ICC was required to decide the feasibility of a plan to reorganize the Milwaukee as a transcontinental carrier. In the event that the transcontinental reorganization was found not to be feasible, the MRRA further provided a rapid procedure for the authorization of abandonments and sales. Subordinated federal financing of operations was to continue for a 60 day period following a finding of non-feasibility.

With respect to labor protection, the MRRA adopted a compromise proposal similar to that suggested in the Trustee's reorganization plan. Under that proposal, each individual employee of the Milwaukee was given the option to accept guaranteed prompt payment of reduced labor protection benefits in return for waiving his right to statutory protection. It was expected that this option would be attractive because the Milwaukee's lack of funds, and questions with respect to the proper priority of labor protection claims, indicated that payment of such claims would, at best, be delayed.

Sections 8 through 15 of the MRRA establish the statutory scheme for the guaranteed immediate payment of a reduced amount of employee protection. These sections provide federal financing of up to $75,000,000 to fund such payments, [22] and expressly state that acceptance of protection under the MRRA waives any claim to traditional employee protection of the Section 11347 variety. The benefits provided under Sections 8 through 15, as implemented by agreement between the Trustee and the employees' collective bargaining representatives, include:

1. (a) A displacement allowance equal to 80% of an employee's previous compensation for a period of three years; or, at the employee's option, (b) a dismissal allowance equal to $2,000 for each year of his service with the Milwaukee up to a maximum payment of $25,000;

2. Payment of moving expenses incurred as a result of a job change resulting from an abandonment or sale;

3. Up to $3,000 reimbursement of educational expenses for retraining necessitated by an abandonment or sale;

4. Preferential employment rights on other railroads.

The legislative history of the MRRA establishes that Sections 8 through 15 were intended to solve the employee protection problem which threatened the successful reorganization of the Milwaukee. Congress assumed that payment of 11347 type labor protection would be delayed, that the provisions of Section [*sic*] 8 to 15 were necessary to provide immediate assistance to affected employees, and that those provisions were a means by which the potentially destructive [23] effect of full employee protection could be eliminated. These views were expressed by Congressman Edward Madigan, one of the House Managers of the MRRA. During the House debate on the MRRA, Congressman Madigan stated (125 C.R. H10212-H10213, November 2, 1979):

> "Last Tuesday, this body considered and passed legislation designed to bring about the prompt restructuring of the Milwaukee Railroad in order to save the taxpayers money, provide reliable service for most of the shippers served by the Milwaukee Railroad, and to assure certainty and prompt payment of employee protection benefits.
>
> . . .The action taken by the House Tuesday and the conference substitute before us today will assure a prompt and workable method for reorganizing the Milwaukee Railroad by permitting sales of lines to other carriers and by providing an affordable method of employee protection which will not totally erode all of the assets of the Milwaukee estate.
>
> * * *
>
> . . . I view the labor protection provisions of this bill as a [*sic*] historic step forward in providing rational but fair and equitable labor protection in this industry. I need not remind you of the tremendous burden placed on the railroad industry under traditional labor protection arrangements. . . . The total cost of that type of protection for the Milwaukee Railroad has been estimated to run anywhere from $300 million to $1.2 billion. Faced with such a staggering cost, the Milwaukee Railroad could not reorganize because it would have no money left to operate the restructured railroad.
>
> Under the [MRRA], Government assistance is provided in the form of a $75 million loan to the Milwaukee Railroad. . . The purpose of the loan is to permit the Milwaukee Railroad to promptly pay specified labor protection claims if the employee waives traditional labor protection."

[24] Adoption of the RLEA's argument would defeat the intent and purpose of Congress in enacting the MRRA. A determination that Section 5 of the MRRA requires immediate payment of traditional labor protection would negate the intended effect of Sections 8 through 15 of that Act. The choice given to an employee would be protection of 80 percent of his income for three years or protection of 100 percent of his income for six years. No employee would choose MRRA protection, and the Milwaukee would be faced with a liability so large as to endanger or destroy any possibility of its survival.

Even without regard to the statutory scheme of the MRRA, it would be necessary to exercise discretionary authority to postpone payment of traditional labor protection. Immediate payment of such protection would impede reorganization by preventing utilization of the Milwaukee's scarce cash resources for needed rehabilitation.

Preservation of the possibility of a successful reorganization requires that all available financial resources be utilized in an effort to rehabilitate the Milwaukee's facilities as quickly as possible. The precarious financial condition of the Milwaukee has been detailed on several occasions. The reorganizability of the Milwaukee is subject to significant doubt, and each day of continued deficit operation reduces the prospect of development of a successful plan. These deficits can only be eliminated through rapid rehabilitation [25] of the Milwaukee's plant and equipment. In the absence of such rehabilitation, the Milwaukee cannot achieve the operating efficiency and improvement of service necessary to attain profitability. The diversion of funds to protection payments would delay rehabilitation, and increase the risk that the Milwaukee will drown in interim losses before its profitability can be restored.

The case law establishes the Court's authority to postpone the satisfaction of claims, including those having priority, where postponement is necessary to achieve a railroad reorganization under Section 77. In *Continental Ill. National Bank* v. *Chicago, Rock Island & Pacific R. [sic] Co.*, 294 U.S. 648 (1934) [*sic*], for example, the Supreme Court recognized that the extraordinary powers of a Section 77 reorganization court include authority to postpone the satisfaction of valid claims. In that case, the Court relied on the need

to preserve assets for use in reorganization in upholding an injunction which prohibited a secured creditor from selling collateral in its possession. The Court stated (294 U.S. at 676):

> "It may be that in an ordinary bankruptcy proceeding the issue of an injunction in the circumstances here presented would not be sustained. As to that it is not necessary to express an opinion. But a proceeding under § 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile."

[26] Several recent decisions have followed *Continental Bank* in upholding orders postponing the payment of claims to preserve funds needed for a successful railroad reorganization. In *Matter of Lehigh Valley Railroad Company*, 458 F.2d 1041, 1045 (3rd Cir. 1972) the Court stated:

> "It is a legitimate and primary concern of a section 77 reorganization court that the assets of the debtor be marshalled and used to assure the continuing operation of the railroad for a reasonable time to permit the preparation and consideration of a plan of reorganization. In this process the court may, as was done here, postpone the determination of the validity and character of a claimed lien upon property of the debtor, as well as the award of any merited priority to the claim thus secured, until a later date or reorganization."

Similarly, in *Matter of Penn Central Transp. Co.*, 452 F.2d 1107, 1108-09 (3rd Cir. 1971), cert. den., 406 U.S. 944 (1972), the Court stated:

> ". . . Since they accrued during reorganization the taxes here at issue are administrative expenses entitled ultimately to share pro rata with all claims within the first priority classification under section 64 of the Act, 11 U.S.C. §104. Pro rata participation, however, does not necessarily imply that all claims are entitled to simultaneous participation. To so hold would unduly impair the flexibility so essential to a reorganization proceeding.
>
> After due inquiry the district court concluded in effect that immediate payment of the property taxes in question would probably defeat the reorganization. It therefore decided that

> under the circumstances the only viable recourse was to postpone such payment for a reasonable time, taking into consideration the competing public interests inherent in reorganizing the railroad and in maintaining the revenues of the various taxing entities affected by the injunction. . . . Under these circumstances we conclude that section 77 did authorize the reorganization court to enjoin temporarily the payment or collection of the assessed property taxes."

[27] Delaying payment of labor protection claims is also necessary because a determination of the priority of those claims may turn upon circumstances which cannot be known until a reorganization plan is consumated [*sic*]. The issue of the proper priority of amounts due employees under Section 11347 protection conditions is a complex question of first impression. In the absence of a resolution of this issue, it would be improper to pay such claims. Unless labor protection payments are entitled to first priority as expenses of administration, their payment must await the satisfaction of prior charges and the determination of the claims of other general creditors.

The decisions which come closest to dealing with the issue presented here involve the priority of contractual severance payments in non-railroad reorganizations. These cases turn on the question of whether such payments constitute a "cost and expense of administration" under Sec. 64(a)(1) of the Bankruptcy Act. Two Courts of Appeals have held that severance payments which vary in accordance with an employee's length of service, as do 11347 benefits, are entitled to priority only to the extent they can be attributed to services performed after the filing of the Bankruptcy Petition. *In Re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir. 1976); *In Re Public Ledger*, 161 F.2d 762, 771-773 (3rd Cir. 1947). Another Circuit has held, however, that [28] the full amount of such variable severance payments is entitled to priority. *Straus-Duparquet, Inc.* v. *Local No. 3*, 386 F.2d 649 (2d Cir. 1967). The former holding is based on the view that only those payments which are attributable to service during the reorganization can properly be considered incident to the Trustee's operation of the business. The latter holding is based on the view that severance payments are compensation for the Trustee's decision to terminate the employee's service, and, therefore, their full amount is incident to the Trustee's operation of the business.

None of the foregoing cases is strictly applicable to the present proceeding. They involve bankruptcy proceedings to which Section 64 is made expressly applicable. There is, however, substantial doubt as to whether Section 64 applies to proceedings under Section 77. Collier specifically states that it does not, and indicates that the principles developed in equity receiverships control priorities in such proceedings. Collier, *Bankruptcy*, Vol. 5, Sec. 77.21, pp. 608-609 (14th Ed.). Moreover, each of the foregoing cases involve contractual obligations which were voluntarily assumed by the Trustee, while the present proceeding involves a statutory obligation imposed upon the Trustee.

In addition to the conflict in, and the general inapplicability of, the foregoing authorities, those authorities all seem somewhat limited in their analysis of the problem. A determination as to the priority of an expense incurred [29] during operation of a debtor's business should be made in accordance with the policies which the priority rule is intended to serve. Those policies were enunciated in *Reading Co.* v. *Brown*, 391 U.S. 471 (1968). In that case, the Court determined that an expense should be accorded first priority if such priority is necessary "to encourage third parties to deal with an insolvent business" or to provide "fairness to all persons having claims against an insolvent." *Id.* at 477. Ultimately, the Court concluded that tort claims resulting from the negligence of the Trustee should be afforded first priority even though such a priority was not necessary to induce dealings with the Trustee. The Court reasoned that fairness required that those injured as a result of operation of the debtor's business be compensated before the satisfaction of the claims of those creditors for whose benefit the reorganization was being conducted.

Neither *Mammoth Mart*, *Public Ledger* nor *Straus Duparquet* give adequate consideration to the question of fairness. *Mammoth Mart* and *Public Ledger* assume that only those claims for which the Trustee received a corresponding benefit are entitled to priority, while *Straus Duparquet* assumes that any claim which accrues as a result of the Trustee's operation of the debtor's business is entitled to priority. Neither assumption is in accord with the Supreme Court's conclusion in *Reading*. *Reading* requires that the priority of a claim [30] which accrues during operation of the debtor's business, but

which need not be paid to induce dealings with the Trustee, be determined in light of the objective of providing fair treatment "to all persons having claims against the insolvent." In this case, such a determination requires consideration of the ultimate fate of the Milwaukee, the amount of the labor protection claims, the effect of the claims on reorganization, and the effect that affording priority to such claims will have upon the other creditors of the Milwaukee.

The decision in *Securities and Exchange Commission* v. *Milner*, 474 F.2d 162 (1st Cir. 1973), provides support for the conclusion that the priority of labor protection claims should not be decided until all relevant circumstances are known. In that case, the improper actions of a trustee resulted in the accumulation of substantial liabilities to customers and employees during the trustee's operation of the debtor's business. A successor trustee proposed a liquidation plan under which, in reliance on *Reading*, priority treatment was afforded to the claims of those customers and employees. The Court of Appeals reversed the District Court's approval of the plan on the ground that it would be improper to apply *Reading* to different facts without a full development of the circumstances surrounding the claims involved.

Having concluded that protection must be prescribed, and that its payment must be delayed, only a determination of the terms of the required protection remains. This determination [31] involves resolution of the question of whether Section 5 of the MRRA requires imposition of *Oregon Short Line III* conditions without modification. Since the parties agree that most of the requirements of *Oregon Short Line III* are appropriate here, the practical significance of this question is primarily related to the notice requirement contained in those conditions. That requirement would raise the possibility that railway labor could require continued operation of the lines to be abandoned for 90 days after abandonment is authorized. The imposition of such a condition in this case would be contrary to the statutory language and reorganization scheme of the MRRA, and would, in any event, be futile in light of the Seventh Circuit's decision in *Matter of Chicago, Milwaukee St. Paul & Pacific Railroad Co.* (7th Cir. October 2, 1979).

A 90 day delay in implementation of an abandonment authorized under Section 5 of the MRRA would be contrary to the reorganization scheme created by that Act. A principle element in the compromise which led to passage of the MRRA was the ability of the Trustee to cease operation of unprofitable lines rapidly. A 90 day delay in termination of service on such lines would eliminate that element and threaten reorganization.

The conflict between the 90 day requirement and the MRRA is obvious from consideration of the express language of Section 5(a)(1). As previously noted, Section 5(a)(1) [32] permits the reorganization court, upon approval of an abandonment, to authorize termination of service during the time for appeal of the abandonment order. This provision is a liberalization of Section 1170, which does not permit termination of service during the period for appeal, and which requires a separate hearing for consideration of a request to terminate after an appeal is filed. Since Congress took affirmative steps to permit the cessation of service during the appeal period immediately following authorization of an abandonment, the suggestion that it also required labor protection which might delay cessation of service for 90 days is not logical.

The provisions of Section 7 of the MRRA are also inconsistent with imposition of a 90 day notice requirement. At the time the MRRA was enacted, 70 percent of the Milwaukee system was embargoed because of the Milwaukee's cash shortage. The MRRA required the Milwaukee to continue to operate its full system while the feasibility of a transcontinental reorganization proposal was considered, and provided for rapid consideration of abandonments thereafter. To enable the Milwaukee to operate its entire system, Congress provided subordinated loans to it during consideration of the transcontinental reorganization and for 60 days after its rejection. This 60 day period was designed to enable the Milwaukee to continue operations while complying with the expedited abandonment [33] requirements. Congressman Madigan specifically stated that the federal funds were intended to cover the full restructuring period (125 C.R. H10213, November 2, 1979):

> "The primary emphasis in the bill is on the use of Government loans in order to permit the prompt restructuring of the railroad.

> . . . The moneys which will be advanced to the Milwaukee Railroad under the Emergency Rail Services Act in order to continue operations during the several month period necessary for restructuring will be subordinated to the claims of the creditors of the Milwaukee estate."

The imposition of a 90 day notice requirement is inconsistent with the Congressional determination to support continued operation of the portions of the Milwaukee outside the core for only 60 days. Congress apparently felt obligated, in light of the embargo decisions of the Seventh Circuit and the Reorganization Court, to provide subordinated financing to cover losses attributable to the MRRA's requirement of continued operation of the entire Milwaukee system. The fact that it provided such funding for only 60 days after rejection of the transcontinental reorganization plan indicates that it believed that the expedited abandonments permitted by the MRRA could, and should, be accomplished within that period.

The imposition of a 90 day notice requirement would, in any event, be futile in light of the Seventh Circuit's decision in *Matter of Chicago Milwaukee St. Paul & Pacific Railroad Co.*, (7th Cir., October 2, 1979). That decision precludes the use of first priority borrowing to operate the [34] Milwaukee's entire system. The subordinated funds provided by the MRRA for such operation will expire on Februrary [*sic*] 29, 1980, and it apparently will be necessary for the Trustee to borrow funds on a first priority basis to continue operation beyond that point. Imposition of a 90 day notice requirement might, therefore, necessitate a prompt embargo of the lines involved here, and afford no real protection to the affected employees.

Even without regard to the MRRA and the Seventh Circuit's embargo decision, a modification of the notice requirements of *Oregon Short Line III* to meet the unusual circumstances of this case would be in accordance with the requirements of Section 11347. In the *Oregon Short Line* and *New York Dock* cases, the Commission concluded only that the conditions therein prescribed were appropriate for imposition in the usual case. These decisions did not conclude that *Oregon Short Line III* conditions must be inflexibly applied to every abandonment regardless of its individual circumstances.

Moreover, in affirming *New York Dock*, the Court of Appeals specifically stated that "it is beyond challenge that within its discretion the ICC may fashion employee protective conditions that are tailored to the special circumstances of individual cases." The statutory requirement of Section 11347 is not that any particular type of protection conditions be imposed, but only that conditions "at least as protective" as the traditional Commission conditions be imposed. RLEA's counsel has admitted that some modification of the *Oregon* [35] *Short Line III* notice provisions is appropriate here (T. 56).

In view of the special considerations involved, it is appropriate to modify the notice requirement of *Oregon Short Line* in several respects. These alterations include shortening the notice period, permitting effectuation of the abandonment prior to negotiation of an implementing agreement, and requiring that any employee improperly displaced, dismissed or reassigned prior to completion of such an agreement be made whole for any losses suffered thereby. Such a condition would permit prompt termination of service following authorization of the abandonment, but would guarantee that no employee would be adversely affected simply because service is discontinued prior to establishment of an implementing agreement.*

The shortened notice provision is similar to that prescribed by the Secretary of Labor pursuant to the Rail Passenger Service Act of 1970, and that provision was held to be the equivalent of traditional Commission prescribed labor protection in *Congress of Railway Unions* v. *Hodgson*, 326 F.Supp. 68 (D.D.C. 1971). The Rail Passenger Act required employee protection at least as beneficial as that ordinarily [36] prescribed by the Commission in a Section 11347 type transaction. In *Hodgson*, the Court rejected the RLEA's contention that the failure of the prescribed protection to include the 90 day notice requirement rendered the protection inadequate. The Court held that the time limits contained in the Rail Passenger Service Act precluded a 90 day delay in implementation of the transactions involved and that the conditions prescribed by the Secretary of Labor

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* The prescribed labor protection conditions require 10 days notice after authorization of an abandonment. The propriety of the 10 day period is particularly clear in the circumstances present here since the nature of the abandonment transactions contemplated by the Trustee has been a matter of public record for many months.

fully protected employees from any adverse effect of consumation [*sic*] of those transactions prior to negotiation of an implementing agreement.

The Indenture Trustee's argument that no protection should be prescribed for employees in connection with authorization of the requested abandonments is also contrary to the requirements of the MRRA. The Indenture Trustee's argument is premised on the view that the Milwaukee may eventually be found to be unreorganizable and that it will then be liquidated in its entirety. The Indenture Trustees point to two Commission decisions which have held that Section 10903 does not require protection where abandonment of an entire railroad is authorized. *North Hampton and Bath R. Co. Abandonment*, 354 ICC 784 (1978), *Wellsville, Addison & Galeton R. Corp. Abandonment*, 354 ICC 744 (1978). From these cases, the Indenture Trustees conclude that no protection should be prescribed in these proceedings until the ultimate fate of the Milwaukee is determined.

[37] There are, however, no present plans to liquidate the entire Milwaukee. The abandonments are sought here as the first step in restructuring the Milwaukee to a reduced core system. The expedited abandonment procedures of the MRRA were enacted for the purpose of accomplishing such a restructuring, and Congress mandated that employee protection be prescribed at the time such abandonments are authorized.

There is, of course, a possibility that a complete liquidation of the Milwaukee will become necessary. For the time being, however, portions of the system will continue to operate while reorganization of the Milwaukee is attempted. During this time period, there is no basis for denying protective benefits to affected employees.

The conditions recommended herein are, however, for the purpose of protecting employees from the effects of the limited restructuring abandonments recommended in this Report. These protections apply only to the extent that an adverse effect on an individual's employment is attributable to those abandonments. They are not intended to provide a guarantee against the effect of a total liquidation of the Milwaukee's operations. They should not, therefore, be interpreted

as providing an absolute six year guarantee to affected employees. Should a total liquidation take place at a later date, the question of whether employees covered by conditions prescribed herein could continue to draw benefits under those conditions would have to be resolved in light of the circumstances existing at that time.

[38]**IV. Recommendations**

It is respectfully recommended to the Court by the Special Master that:

(a) The Trustee be authorized to abandon each of the lines identified in Appendix A hereto;

(b) The conditions attached as Appendix B hereto be prescribed for the protection of employees affected by the authorized abandonments;

(c) The Trustee be authorized to terminate service on each of the lines identified in Appendix A hereto 10 days after giving the notice required by Article I, Paragraph 4 of Appendix B;

(d) The Trustee be authorized to defer payment of protection benefits under Appendix B, and that the Trustee be directed to establish a procedure for the filing of claims by employees for amounts due under that Appendix; and

(e) The Court reserve jurisdiction to determine the priority of claims under Appendix B at a future date, and to determine the rights of employees covered by Appendix B to continue to obtain benefits thereunder in the event of a total liquidation of the Milwaukee.

Respectfully submitted,

MILTON H. GRAY
Milton H. Gray, Special Master

Dated: February 20, 1980

APPENDIX D

APPEAL NO. 80-1348

In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.

APPEAL OF

Railway Labor Executives' Association

ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Appendix D-1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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77 B 8999

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY,

Debtor.

In Proceedings For The Reorganization Of A Railroad

ORDER NO. 274 A

The Trustee has filed an application for preliminary approval of the sale of the line from Port Townsend to Port Angeles, Washington and its appurtenances, to the Seattle and North Coast Railroad Company or its nominee. Preliminary approval is subject to I.C.C. approval pursuant to § 5(b)(3) of the Milwaukee Railroad Restructuring Act of 1979 and is also conditioned by § 5(b)(1) of that Act. Objections have been filed by the Railway Labor Executives [*sic*] Association and by the indenture trustees, but we find that these objections should be overruled.

The indenture trustees' objection is based partly upon the Trustee's bidding procedure and the consideration offered by the highest bidder. The major portion of the property was appraised for non-railroad use at a figure between $3.1 million and $3.8 million on July 30, 1979, and the Trustee recommends accepting the bid of the Seattle and North Coast Railroad Company for use of the property as a transportation facility for $4,510,000. Of this, $2,743,000 would be allocated to the real estate itself, subject to the lien of the indenture trustees, hence the gross real estate figure is lower than the original appraisal. However, that appraiser is now of the opinion that the

amount allocated to land is "reasonably related" to his original minimum figure adjusted to current economic conditions.

This apparent shortfall is also justified in view of the expenses which would necessarily be incurred in clearing and marketing the land for other than transportation use and in view of the speculative sale price of the appurtenant property such as rail-car barges, a barge landing, Pier 27 at Seattle, and similar specialized items which can only be used for rail and sea transportation.

We also take special cognizance of 11 U.S.C. §1170(a)(2) which requires us and the I.C.C. to determine whether abandonment of this line would be "consistent with the public interest." The Port of Port Townsend Commissioners supports the sale, and the State of Washington Utilities and Transportation Authority considers this segment "essential" to local shippers. The indenture trustees offer no evidence that abandonment of this facility and sale of the land for commercial or other private uses would be in the public interest. Nor do they show any reason to believe another buyer or buyers would out-bid the available entity. Their objections therefore must be overruled.

The Railway Labor Executives [*sic*] Association objects to the sale on the ground that protection of the employees who may be laid-off or otherwise dislocated by this sale has not been provided for as required by § 5(b)(1) of the Milwaukee Railroad Restructuring Act, which incorporates 49 U.S.C. §11347. However, § 5(b)(1) specifically requires the court to provide for an employee protection plan, and such a plan is now under consideration by the court. The sale is subject to the requirement of § 5(b)(1) as a matter of law.

The purchaser is required to employ former Milwaukee Railroad workers during the interim period pending I.C.C. review, but the Trustee is not relieved from his responsibilities both to his employees and their unions. Since the Trustee is seeking only preliminary approval subject to I.C.C. approval, the objection of the Railway Labor Executives [*sic*] Association to the proposed sale is therefore overruled, without prejudice to settlement of its claims and those of its members by the Trustee.

On the basis of the affidavits and other documents filed by the Trustee on November 19, 1979 and December 14, 1979, we find and conclude that his application is in the best interest of the public and of the estate and that no substantial objections have been made which would justify further delay or bidding. An appropriate order approving the application on a preliminary basis has been entered.

SO ORDERED

/s/ THOMAS R. MCMILLEN
JUDGE, U.S. DISTRICT COURT

DATED: Jan. 4, 1980

Appendix D-2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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77 B 8999

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY,

Debtor.

In Proceedings For The Reorganization Of A Railroad

ORDER NO. 297

D E C I S I O N

ON TRUSTEE'S MOTION TO SEVER THE METALINE FALLS AND PORT ANGELES BRANCH LINES FROM THE MILES CITY WEST PROCEEDING; AND FOR AN AUTHORIZATION TO ABANDON BOTH BRANCH LINES; AND FOR AN AUTHORIZATION OF TEMPORARY OPERATIONS BY THE ACQUIRING CARRIERS PURSUANT TO I.C.C. EMERGENCY SERVICE ORDERS

Pursuant to this court's minute order dated February 12, 1980, the Trustee has filed a motion for the abandonment and sale of the Metaline Falls and Port Angeles branch lines. The Trustee moves (1) that we sever these branch lines from the Miles City West abandonment proceeding (I.C.C. docket AB-7, Sub. No. 86), (2) that we authorize abandonment of both branch lines pursuant to Section 5(a)(1) of the M.R.R.A., which incorporates 11 U.S.C. §1170, and (3) that we authorize temporary operation by the purchasers under I.C.C. emergency service orders (49 U.S.C. §11123) until such time as the I.C.C. grants the purchasers permanent operating authority (49 U.S.C. §10901).

We have previously approved the terms of sale proposed for each branch line, in Order No. 188 (Metaline Falls) and Order No. 274

(Port Angeles). These branch lines present unusual legal issues and merit expedited consideration apart from the other lines involved in the Miles City West abandonment proceeding.

49 U.S.C. §1170, made applicable to this proceeding by § 5(a)(1) of the M.R.R.A., permits this court, after notice and hearing, to authorize the abandonment of a railroad line if such abandonment is either (1) in the best interest of the estate or (2) essential to the formulation of a reorganization plan, and consistent with the public interest. The hearing with respect to these and other lines west of Miles City, Montana was held before special master Milton H. Gray on February 11, 1980. No party there objected to the abandonment of these two branch lines, and no party has filed any objection to the Trustee's present motion to sever these lines from the Miles City West proceeding, but objections have been raised to other aspects of these two transactions.

The I.C.C. report on the Miles City West abandonment application, issued pursuant to §1170(b), recommends that abandonment be permitted, subject to stated conditions. We also give weight to the State of Washington Department of Transportation's opinion that both of these branch lines serve areas for which continued rail service is "essential." We have no doubt that abandonment of these terminal lines is in the best interest of the estate, particularly in view of our recent embargo order which may soon make them vestigial. We also believe that it will further the public interest, including the interest of the shippers, if transfer of these lines for continued rail use can be achieved expeditiously. Both prospective purchasers have emphasized the importance of quick action if they are to commit themselves to the maintenance of this rail service. Pursuant to § 5(a)(1) of the M.R.R.A., the Trustee's motion for an authorization to abandon the Metaline Falls and Port Angeles branch lines is therefore granted.

The crucial decision in these abandonments is raised by the objection of the Railway Labor Executives' Association (R.L.E.A.). Section 5(b)(1) of the M.R.R.A. permits this court to authorize "the sale or transfer of a line of the Milwaukee Railroad *to be used in continued rail operations*," subject to I.C.C. approval under § 5(b)(2). Section 5(b)(2) has not been satisfied with respect to either sale. The crux of R.L.E.A.'s argument is that the two purchasers, although merely

prospective carriers, must be bound by the labor protection arrangement required by § 5(b)(1) and will be entitled to job protection with the purchasers.

On the other hand, if these transactions are consummated as abandonments followed by a sale to an entity which has never been a carrier, the Trustee and the purchasers contend that § 5(a)(1) of the M.R.R.A. applies. In such event, the purchasers will not be bound by the existing collective bargaining agreements, and the employees will be severed from their jobs with the same benefits as accorded to employees of operations which are completely terminated.

Sections 5(a) and 5(b) of the M.R.R.A. were obviously intended to govern two different types of transactions. Section 5(a) applies to a simple abandonment "pursuant to §1170 of title 11," and § 5(b) applies to the "sale or transfer of a line of the Milwaukee Railroad to be used in continued rail operations, subject to the approval of the Commission. . . ." Section 5(a) must be taken to apply to sales to any non-carrier, since the bankrupt railroad does not simply abandon its abandonments. Both sections require the carrier "to provide a fair arrangement at least as protective of the interests of employees as that required under §11347 of title 49. . . ." But § 5(b)(2) conditions the sale or transfer upon I.C.C. approval and § 5(b)(3) allows the "purchasing *carrier* to operate interim service as a common carrier . . . [and] shall use employees of the Milwaukee Railroad to the extent necessary for the operation of such service." Thus § 5(b) applies to the usual transactions between carriers and § 5(a) applies to abandonments. Neither section specifically mentions sales to non-carriers who intend to operate the line.

The starting point for our consideration of this apparent void is the Conference Report on § 5 of the M.R.R.A. (1979 *United States Code Cong. & Ad. News* at 3323):

> . . . The Conferees intend that the granting of authority to the Bankruptcy Court to order sales and abandonments not change existing law with respect to employee protection. The employees' right to protection shall be required by the Court to the same extent that it would have been provided by the Interstate Commerce Commission under Section 11347 of the Interstate

> Commerce Act. Nothing in this section shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this section.

Thus Congress clearly intended to leave existing law with respect to employee protection untouched. Examining R.L.E.A.'s position with respect to labor protection, we find that it attempts to liberalize the existing law, by using the bare language of § 5 itself, to amend "existing law."

Under present law, apart from the M.R.R.A., 49 U.S.C. §10901 and not §11343 governs the acquisition by a non-carrier of a line being abandoned by a carrier. In *People of the State of Illinois* v. *United States*, 604 F.2d 519 (7th Cir. 1979), the Seventh Circuit held that §1(18), the predecessor to §10901, rather than § 5(2), the predecessor to §11343, governed applications by a non-carrier to acquire and operate an existing railroad. Thus the purchasers herein acquire these two properties pursuant to §10901.

The I.C.C.'s recent decision in *Durango & S.N.G. RR. [sic] Co.—Acquisition and Operation*, Finance Doc. Nos. 29096 and 29155 served January 16, 1980, confirms this. As we read that decision, the Commission can and will exercise its discretion to impose labor protection conditions in a sale made pursuant to §10901. We do not read that decision as requiring that the prospective purchaser be bound by the labor protection conditions applicable to the employees of the abandoning carrier. The Commission imposed the burden of labor protection costs solely upon the abandoning carrier (p. 4).

Pursuant to § 5(a)(1), we will impose the labor protection conditions set forth in this court's Order No. 276C, which approved the conditions contained in Appendix B to the special master's report, with some slight modification. The Milwaukee will bear the full costs of these protections, as it is willing to do. Thereby the affected employees will receive the same benefits as the employees of other abandoned branch lines, and the purchasers will not be burdened with wage rates and working conditions which they contend would prevent consummation of both transactions.

The Trustee's motion asks that this court authorize temporary operation by the purchasers under I.C.C. authority, until such time as the I.C.C. grants permanent operating authority. In a decision served January 25, 1980, the I.C.C. confirmed its authority to issue Service Order No. 1399 under 49 U.S.C. §11123, with respect to the Metaline Falls branch line. Over R.L.E.A.'s objection, the Commission found that §11123 enables it to grant emergency authority for temporary operations over another carrier's line. In view of this court's embargo decision (Order No. 290A), it appears that the prospective purchasers may seek such orders, with the Trustee's co-operation, so that these essential services are maintained. We need not consider R.L.E.A.'s objection to the validity of this beneficial authority, which may be reviewed elsewhere.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Trustee's motion for severance, abandonment and sale of the Metaline Falls and Port Angeles branch lines, and the relief sought thereunder, are granted. The Trustee's proposed order has been modified to accommodate this court's Order No. 276B on labor protection conditions.

ENTER:

/s/ THOMAS R. MCMILLEN
JUDGE, U.S. DISTRICT COURT

DATED: Feb. 29, 1980

Appendix D-3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

---

77 B 8999

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY,

Debtor.

In Proceedings For The Reorganization Of A Railroad

ORDER NO. 297A

(1) The Newport to Metaline Falls, Washington and Seattle (Pier 27) to Port Townsend to Port Angeles, Washington branch lines are severed from the Pacific Coast Extension abandonment proceeding now assigned to Master Gray and the Trustee is authorized to abandon both branches. Conditions are prescribed for the protection of employees affected by these abandonments in accordance with Appendix B attached to Special Master Gray's Report dated February 20, 1980 with respect to abandonment of 18 branch lines, as supplemented by Orders No. 276B and 276C.

(2) The Trustee is authorized to abandon service on both lines 10 days after giving the notice required by Article 1, Paragraph 4 of Appendix B to the Special Master's Report.

(3) The Trustee is authorized to defer payment of protection benefits under Appendix B and is directed to establish a procedure for the filing of claims by employees for amounts due under that Appendix.

(4) The Court reserves jurisdiction to determine the priority of claims under Appendix B at a future date and to determine the rights of employees covered by Appendix B to continue to obtain benefits thereunder in the event of a total liquidation of the Debtor.

(5) Pursuant to Order No. 188, the Trustee is authorized to sell and convey the Metaline Falls branch to the Port of Pend Oreille.

(6) The Trustee is authorized to sell and convey by quit claim deed the Port Angeles branch (including Pier 27) to the Seattle and North Coast Railway Company ("S&NC") pursuant to the agreement preliminarily approved by Order No. 274, when the S&NC has satisfactorily completed its obligations under such agreement. Should the Port Angeles branch properties be sold and conveyed in accordance with the agreement, the rights, claims, liens and interests of the Trustee, the holders of any Trustee's certificates, the Debtor, the trustees under applicable mortgages, state and local tax agencies and any other claimants in, upon or against the property authorized to be sold by this Order shall be transferred from said property to the net proceeds from the sale. The proceeds from such sale and conveyance, net of all expenses incident or related to the sale, shall, until further order of the Court, be deposited and retained in a new or existing trust account bearing the designation "Real Estate Sales" at the Continental Illinois National Bank and Trust Company of Chicago and shall be invested in short-term securities of the United States Government in accordance with instructions from the Trustee or a person designated by him.

(7) The "Petition for Approval of Abandonment of Rail Service at Pier 27 in the Port of Seattle" filed by the Port of Seattle is stricken without prejudice and by agreement, subject to renoting after the I.C.C. issues an administratively final decision in Finance Docket No. 29158, *Seattle and North Coast Railway Company — Acquisition and Operation of a Line of Railroad in the State of Washington*. The Court requests the I.C.C. in its consideration and final decision in F.D. 29158 to determine the question of whether the S&NC and the public interest require the Pier 27 properties to be used by S&NC in operating the Port Townsend to Port Angeles, Washington branch line.

(8) Lease of the Metaline Falls branch prior to consummation of the sale was authorized by Order No. 188. The Trustee is authorized to lease the Port Angeles branch to S&NC prior to consummation of the sale for the amount of $37,750 per month applicable to the

purchase price. Since preliminary approval of the sales and associated operating authorities was not requested under Section 5(b)(3) of the Restructuring Act, the purchasers must obtain appropriate operating authority from the I.C.C. under the Interstate Commence Act.

/s/ THOMAS R. MCMILLEN
DISTRICT JUDGE

Dated: February 29, 1980

APPENDIX E

APPEAL NO. 80-1545

In re Chicago, Milwaukee,
St. Paul & Pacific Railroad Co.

APPEAL OF

Railway Labor Executives' Association

ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION AND RELATED MATERIALS

Appendix E-1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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77 B 8999

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY,

Debtor.

In Proceedings For The Reorganization Of A Railroad

ORDER NO. 307

Milton H. Gray, Esq. as special master has filed recommended findings and conclusions dated February 29, 1980 with respect to the Trustee's application for abandonment of the Pacific Coast Extension. The objections of four indenture trustees have been filed to date, and counsel for the Railway Labor Executives' Association has stated in open court that R.L.E.A. adheres to the position taken in response to Order No. 276B.

The indenture trustees do not oppose abandonment of the Pacific Coast Extension, but they contended that if the I.C.C. has rejected the New Milwaukee Lines and the Trustee's reorganization plans by the time of this court's order and if this abandonment is merely part of a cessation of all operations, then this court should reject the special master's recommendation that labor protection conditions be imposed or, in the alternative, set further hearings on the labor protection issue. In a decision served March 19, 1980 (Fin. Doc. No. 28640, Sub.-No. 5), the Commission did disapprove the New Milwaukee Lines and the Trustee's reorganization plans, but also disapproved complete liquidation.

In view of our subsequent Order No. 290F, which provides for continued operation of a reduced system at least until May 1980, the

indenture trustees' objections must be overruled. The best interests of the estate require immediate authorization of this abandonment, as recommended by Master Gray. We held in Order No. 276B that § 5(a)(1) of the M.R.R.A. mandates the carrier to provide a "fair arrangement" for labor protection in any abandonment made pursuant to that section.

The Trustee has filed a statement expressing his views on the special master's recommendations. While generally in agreement, he objects to the special master's recommendation concerning computation of the labor protection benefits. Master Gray accepted the I.C.C.'s position that the base period for computing displacement and dismissal allowances (in Article I, §§ 5 and 6(a)) should be the last 12 months in which the employee performed compensated service for more than 50 percent of each such month. Cf. *New York Dock Ry. etc,* 360 I.C.C. 60 (1979). The Trustee adheres to the position adopted before Master Gray, that work performed during the last 12 months should be the basis, in the absence of abandonment (and, presumably, embargo).

However, we believe the Master's recommendation is more equitable than the Trustee's. As Master Gray noted (Rept. at 25), management's views concerning the inutility of operating the Pacific Coast Extension have no doubt affected the allocation of resources on the Milwaukee system during the last 12 months. For example, in Order No. 167B, this court last June directed the Trustee to use that borrowing, to the extent permissible, for the benefit of those portions of the railroad which may possibly be reorganizable. Similarly, this court in Order No. 220A declined to authorize funds for the upgrading of the Pacific Coast Extension. The Court of Appeals would have shut down the Pacific Coast Extention had Congress not intervened with the M.R.R.A.

We agree with Master Gray that deference to the I.C.C.'s expertise is appropriate in this instance. The Trustee failed to introduce any evidence of the difference in cost between the two labor protection periods. Moreover, Order No. 276B held that the Trustee is not obliged to pay these benefits commencing with abandonment but that he may defer them pending reorganization. The labor protection settlement program authorized by Order No. 286 is also available to

employees and will doubtless resolve many claims. The Trustee's objection to this recommendation is therefore overruled.

We therefore adopt the special master's report of February 29, 1980 on abandonment of the Pacific Coast Extension. However, we find that recommendations (f) and (g) (Rept., last page) are now moot. To resurrect recommendation (g), we direct the Trustee to fully pursue all possibilities for sale of portions of these lines for continued rail operation or other public use before he disturbs any track or facilities west of Miles City, Montana, or takes any other step which would impede such sales. We will sign the Trustee's proposed order, modifying it to reflect Master Gray's recommendation (b) (Rept. at 26), and deleting paragraphs 5 and 6 thereof.

ENTER:

/s/ THOMAS R. MCMILLEN
JUDGE, U.S. DISTRICT COURT

DATED: Apr. 2, 1980

Appendix E-2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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77 B 8999

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY,

Debtor.

In Proceedings For The Reorganization Of A Railroad

ORDER NO. 307A

(1) The Trustee is authorized to abandon all lines west of Miles City, Montana with the exception of its trackage rights between Miles City and Billings, Montana;

(2) The Trustee is authorized to terminate service on the lines as to which abandonment is authorized ten (10) days after giving the notice required by Article I, Paragraph 4 of Appendix B to the Special Master's Report, except where such termination would be contrary to the provisions of Order No. 290A or a subsequent order concerning the current embargo;

(3) The conditions contained in Appendix B to the Report of the Special Master dated February 20, 1980 are adopted for the protection of employees affected by the authorized abandonment, and Section 4(e) is included therein as specified in Order No. 276B; however, the base period shall be the last 12 months in which the affected employee performed service for at least 50% of the normal work period.

(4) The Trustee is authorized to defer payment of amounts due under the labor protection conditions imposed herein, and the Court

reserves jurisdiction to determine the priority for paying such claims at a future date and to determine the rights of employees covered by Appendix B in the event of changed conditions in the consummation of the reorganization proceedings. The Trustee is ordered to submit a plan for filing such claims.

ENTER:

/s/ THOMAS R. MCMILLEN
JUDGE, U.S. DISTRICT COURT

DATED: Apr. 2, 1980

Appendix E-3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

---

77 B 8999

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY,

Debtor.

In Proceedings For The Reorganization Of A Railroad

REPORT OF SPECIAL MASTER, MILTON H. GRAY, INCLUDING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS, ON THE TRUSTEE'S APPLICATION FOR ABANDONMENT OF THE PACIFIC COAST EXTENSION

INDEX

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VI. Labor Protection 22
VII. Recommendations 26

* * * *

* * * *

[22] **VI. Labor Protection**

With a single exception, the issues raised with respect to labor protection are identical to those discussed in the undersigned's prior report dated February 20, 1980 (pp. 15-37). That Report recommended that a modified version of the conditions prescribed by the ICC in *Oregon Short Line R. — Abandonment*, 360 ICC 91 (1979) be imposed for the protection of adversely affected employees, that the payments required by those conditions be deferred, and that the Court reserve jurisdiction to determine the priority of claims filed under those conditions and the right of employees to continue to obtain benefits in the event of a total liquidation of the Milwaukee. The recommendations in the prior Report are, except as modified below, equally applicable to the present [23] proceeding.*

The ICC recommended that the conditions it prescribed in *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 ICC 60 (1979) be imposed for the protection of employees adversely affected by the PCE abandonment.** It also recommended, however, that those protections be increased in one respect. This increase results from the ICC's conclusion that the base period for computing dis-

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* The prior Report recommended that the notice provision of the *Oregon Short Line III* conditions be modified in certain respects. One of these modifications was the inclusion of a provision "requiring that any employee improperly displaced, dismissed or reassigned prior to completion of . . . an [implementing] agreement be made whole for any losses suffered thereby." (Feb. 20 Rpt. 35). Appendix B to the prior Report inadvertently omitted a sentence prescribing that modification. Appendix B should, accordingly, be amended to include the following sentence at the end of Article I, paragraph 4:

> If the above proceeding results in displacement, dismissal, rearrangement, etc. other than as provided by Railroad at the time of the transaction pending the outcome of such proceedings, all employees affected by the transaction during the pendency of such proceedings shall be made whole.

** *New York Dock* protection is essentially identical to *Oregon Short Line III* protection.

placement and dismissal allowances should be the last 12 months in which the employee performed compensated service for more than 50% of the month.

The effect of the alteration recommended by the ICC is to increase the level of income which would be protected during the six year protection period. Without the alteration, [24] an employee would be entitled to receive, during the six year period following abandonment, a monthly income equal to his total earnings in the last twelve months in which he performed any service divided by 12. As a result of the alteration, only those months in which an employee performed service for more than 50% of the time would be utilized in computing the employee's monthly guarantee. Since some PCE employees worked less than 50% of the time in certain months during the last year, the change may significantly increase the amount of their monthly allowance.

The basis of the ICC's alteration is its conclusion that "knowing since at least late summer of 1978 that it would seek to abandon the western lines, the Milwaukee has taken many actions to reduce its costs in the involved region," and these actions may have reduced PCE employees' base earnings. Rpt. 91. The implication of that conclusion is that, absent the prospect of abandonment, the level of operations and employee earnings on the PCE would have been greater. If this implication is correct, it would be unfair to calculate the level of an employee's protection from the adverse effects of an abandonment by using a period in which his earnings were already adversely affected by the contemplated abandonment.

The Trustee disputes the ICC's implication, although he acknowledges that there has been a substantial reduction of operations on the PCE. He contends that the reduction was [25] required by the erosion of PCE traffic and by the Milwaukee's cash position, and that, absent abandonment, operations and earnings on the PCE would continue at the present level. He concludes, therefore, that the alteration would raise employee benefits above the level of income they would realize in the absence of abandonment.

It seems likely that the decision with respect to the level of operations on the PCE was made for the purpose of maximizing the results of operating the Milwaukee's entire system. During the last twelve months, the Milwaukee has teetered on the brink of collapse, moving from one crisis to the next with no assurance of survival. It seems unlikely that, under these circumstances, the Milwaukee would follow a policy of deliberately discouraging profitable traffic.

During the last twelve months, the Milwaukee was, however, also faced with the need to allocate its scarce resources over its entire system. It seems equally unlikely that the views of management as to the potential of the PCE did not affect this allocation. It is reasonable to conclude, therefore, that the reduction of operations on the PCE did not result from the decision to seek abandonment, but did have a common origin with that decision.

The record in this case does not establish that the use of the 50% factor in calculation of base period earnings is either clearly appropriate or clearly inappropriate. Since resolution of the issue is a close question in an area in [26] which the ICC has extensive experience, its views should be followed. The Trustee did not introduce evidence indicating that the difference in protective benefits resulting from this factor would have a significant effect on the possibility of reorganization. Moreover, it is likely that many employees will choose the immediate benefits of Sections 8 through 15 of the MRRA rather than the protection prescribed here.

VII. Recommendations

It is respectfully recommended to the Court by the Special Master that:

(a) The Trustee be authorized to abandon all lines west of Miles City, Montana with the exception of its trackage rights between Miles City and Billings, Montana;

(b) The conditions attached as Appendix B to the undersigned's Report dated February 20, 1980, corrected to include the inadvertent omission noted on page 23 hereof, be prescribed for the protection of employees affected by the authorized abandonments, except that the

base period for computing displacement and dismissal allowances (in Article I, Sections 5 and 6(a)) should be the last 12 months in which the employee performed compensated service for more than 50% of each such month prior to displacement or dismissal;

(c) The Trustee be authorized to terminate service on the lines as to which abandonment is authorized 10 days after giving the notice required by Article 1, Paragraph 4 of [27] Appendix B to the undersigned's Report dated February 20, 1980, except where such termination would be contrary to the provisions of Court Order No. 290A;

(d) The Trustee be authorized to defer payment of amounts due under the protective conditions recommended herein, and that the Trustee be directed to establish a procedure for the filing of claims by employees for amounts due under those conditions;

(e) The Court reserve jurisdiction to determine the priority of claims under the recommended protective conditions at a future date, and to determine the rights of employees covered by those conditions to continue to obtain benefits thereunder in the event of a total liquidation of the Milwaukee;

(f) The Court reserve jurisdiction to reconsider the abandonment recommended herein in the event that on or before March 17, 1980 the ICC determines that a reorganization plan should provide for continued operation of the lines west of Miles City, Montana; and

(g) The Trustee be precluded from disturbing any track or facilities west of Miles City, Montana, or taking any other step which would prevent sale of such properties for continued railroad operation or other public use, prior to April 1, 1980.

Respectfully submitted,

MILTON H. GRAY
Milton H. Gray, Special Master

Dated: February 29, 1980

Appendix E-4
INTERSTATE COMMERCE COMMISSION REPORT

Docket No. AB-7 (Sub-No. 86)

RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY — ABANDONMENT — PORTIONS OF PACIFIC COAST EXTENSION IN MONTANA, IDAHO, WASHINGTON, AND OREGON[1]

Decided: January 29, 1980

Recommendation made to the Reorganization Court that the

> Trustee of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be permitted to abandon all lines and discontinue all operations west of Miles City, MT, with the exception of trackage rights between Miles City and Billings, MT. Since certain Restructuring plans competing with that of the Trustee would embrace the involved lines, further recommended (1) that abandonment authorization be withheld, and (2) if operations by

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[1] The "F" designation originally included in the docket number has been eliminated.

This proceeding embraces Docket No. AB-7 (Sub-No. 64F), Stanley E. G. Hillman, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company-Discontinuance and Abandonment Between East Spokane, WA, and Metaline Falls, WA; Docket No. AB-7 (Sub-No. 69F), Stanley E. G. Hillman, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company-Abandonment Between Winifred Junction, MT, and Winifred, MT; and Docket No. AB-7 (Sub-No. 78F), Stanley E. G. Hillman, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company-Abandonment Between Fairfield, MT, and Agawam, MT.

In this report, references to the record are designated as follows: PR-Tr. 1 and XPR-1 indicate the primary hearing transcript at page 1 and primary hearing Exhibit Number 1, respectively; BU-Tr. and XBU, transcript and exhibit from the Butte public hearings; GF-Tr. and SGF, from Great Falls; MI-Tr. and XMI, from Missoula; SM-Tr. and SXM, from St. Maries; SP-Tr. and SXP, from Spokane; SE-Tr. and XSE, from Seattle; and ML-Tr. and XML, from Moses Lake.

the Trustee become impossible (because of cashlessness or otherwise), that sale of lines or removal of rails, ties, and track structures be precluded, pending disposition of a reorganization plan. Other specific conditions also recommended.

INTRODUCTION

On August 8, 1979, Stanley E. G. Hillman, formerly Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) filed an application [2] and notice of intent to abandon all lines and discontinue all operations west of Miles City, MT, with the exception of trackage rights between Miles City and Billings, MT. The Milwaukee is a common carrier by railroad subject to sub-chapter I of chapter 105 of title 49, *United States Code*. The lines to be abandoned, which constitute most of what is known as the Pacific Coast Extension, include 2,497.7 miles of solely or jointly owned rail line and trackage rights extending from Miles City to Seattle, WA, and south to Portland, OR.

Parties that have participated throughout the oral hearings include the Trustee and the Department of Transportation (DOT) in support of the application, and creditors in support of the application, as a step toward total liquidation of the Milwaukee. Protestants to the application include agencies and citizens of the states of Montana, Idaho, and Washington; New Milwaukee Lines (NewMil); various railway labor organizations; and the Office of Rail Public Counsel (ORPC). Numerous other parties appeared at one or more of the hearings, including potential purchasers of branch lines.

Five administrative law judges, with considerable attorney and accounting staff support, conducted approximately 11 weeks of oral hearings to gather evidence from all parties and to provide opportunities for cross-examination. The applicant presented its case and responded to general clarifying questions at the primary hearing in Butte, MT, during the week of September 10, 1979. Cross-examination of the applicant's witnesses was conducted September 24-28, 1979, at the primary hearing in Chicago, IL. One week public hearings were held during the period [3] October 2-12, 1979, in Butte, Great Falls, and Missoula, MT; St. Maries, ID; and Spokane, Seattle, and Moses Lake, WA. The one-week public (and adjudicative) hearings were held chiefly to provide an opportunity for con-

cerned individuals and companies to testify regarding the public need for the Milwaukee's services in the areas traversed by the involved lines. The primary hearing reconvened for two weeks commencing on October 15, 1979, chiefly for testimony by and cross-examination of protestants' witnesses, and the applicant's rebuttal. On November 1, 1979, hearing was held in Washington, D.C. for the purpose of examining Commission staff who had prepared the Draft Environmental Impact Statement. Briefs have now been submitted.

Section 5 of the recently-enacted Milwaukee Railroad Restructuring Act, Pub.L. No. 96-101, 93 Stat. 736 (1979) (MRRA), has transferred jurisdiction over Milwaukee abandonments from the Commission to the United States District Court for the Northern District of Illinois, Eastern Division (Court), which has jurisdiction over the Milwaukee reorganization. Pursuant to section 1170 of the Bankruptcy Act, 11 U.S.C. §1170, the Court in Order No. 248, issued November 26, 1979 (as subsequently amended in Order No. 248B, issued January 3, 1980), has directed the Commission to present its report in this proceeding no later than January 31, 1980. The instant report contains the Commission's recommendations on the Trustee's abandonment request.

* * *

[90]**EFFECT ON MILWAUKEE EMPLOYEES**

Abandonment of the lines west of Miles City would have a major effect on the Milwaukee's labor force, causing at least 1,482 employees to lose their positions. The unions believe that the number of displaced employees, and the resulting dismissal claims, would be much higher than the railroad estimates. The typical displaced employee would be 39 years old, make $1,825 per month, and have worked for by [*sic*] the Milwaukee for nine years. The applicant estimates that roughly 400 employees would obtain employment with railroads purchasing part of the Milwaukee system.

Section 5(a)(1) of the MRRA provides that in authorizing abandonments, the Court shall require the Milwaukee to accord "a fair arrangement at least as protective of the interests of employees as that required under" 49 U.S.C. §11347. In *New York Dock Ry. — Control*

— *Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), the Commission fashioned comprehensive conditions to meet the requirements of 49 U.S.C. §11347. The Commission's interpretation of those requirements in the *New York Dock* decision was recently upheld by the United States Court of Appeals for the Second Circuit in *New York Dock Railway and Brooklyn Eastern District Terminal* v. *United States of America and Interstate Commerce Commission*, No. 79-4086 (2d Cir. Nov. 7, 1979).

The Railway Labor Executives' Association and the Railway Employees' Department have requested a number of modifications to the *New York Dock* conditions. We do not [91] believe that most of the suggested changes are warranted here. One of the proposed amendments, however, that the base period for computing displacement and dismissal allowances (in Article I, sections 5 and 6(a)) should be the last 12 months in which the employee performed compensated service for more than 50 percent of each such month (as opposed to the last 12 calendar months) prior to displacement or dismissal, *is* appropriate for this particular situation. Knowing since at least late summer of 1978 that it would seek to abandon the western lines, the Milwaukee has taken many actions to reduce its costs in the involved region. A result of those actions may have been a reduction of base period earnings for western employees, with an attendant reduction in labor protection as calculated under the *New York Dock* standard. We shall recommend that the Court impose protection accordingly. We need not consider here questions respecting the cost or priority of the required protective arrangement; those matters are more appropriately addressed in the pending reorganization proceeding.

* * *

[97]**RECOMMENDATIONS**

1. The Trustee of the Milwaukee should be permitted to abandon all lines and discontinue all operations west of Miles City, MT, (with the exception of trackage rights between Miles City and Billings, MT), but (1) abandonment authorization should be withheld, and (2) if operations by the Trustee become impossible (because of cashlessness or otherwise), sale of lines or removal of rails, ties, and track structures should be precluded, pending disposition of a reorganization plan.

2. Conditions for the protection of employees should be imposed as set forth in *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), except that the base period for computing displacement and dismissal allowances (in Article I, sections 5 and 6(a)) should be the last 12 months in which the employee performed compensated service for more than 50 percent of each such month (as opposed to the last 12 calendar months) prior to displacement or dismissal.

3. The Trustee should be precluded for a reasonable period following abandonment from selling, leasing, exchanging, or disposing of the track, structures, right-of-way underlying the track, all bridges, and all culverts unless the property has first been offered, upon reasonable terms, to public authorities or other responsible persons interested in acquiring the property for public use. Public notice of any proposed disposition should be given. In the event that two or more public use bids are submitted, [98] priority consideration should be accorded firstly to continued rail operation, secondly to "rail banking", and thirdly to non-rail public use.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, and Alexis.

Commissioner Clapp dissenting with a separate expression.

AGATHA L. MERGENOVICH

(Seal) Secretary

* * *

APPENDIX F

APPEAL NO. 80-1546

In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.

APPEAL OF

Railway Labor Executives' Association

ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION AND RELATED MATERIALS

Appendix F-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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77 B 8999

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY,

Debtor.

In Proceedings For The Reorganization Of A Railroad

ORDER NO. 281A

1. The Court approves abandonment and sale of the following branch lines to the State of Wisconsin: Waukesha to Milton Junction; Sparta to Viroqua; Tomahawk to Heafford Junction; Monroe to Mineral Point; Ripon Junction to Oshkosh and Walworth to Avalon.

2. Employees affected by these transactions shall receive protection as required by law from the Estate of the Milwaukee Road, and the State of Wisconsin shall have no liability in connection therewith.

3. Wisconsin's operator of the Monroe to Mineral Point line may have access to such line via the Debtor's trackage between Janesville and Monroe, provided that appropriate I.C.C. authority is obtained and appropriate arrangements are made with the Trustee. In the event this Court authorizes an embargo of the Janesville to Monroe segment, Wisconsin's operator may serve shippers on such segment, again provided that appropriate I.C.C. authority is obtained and appropriate arrangements are made with the Trustee.

/s/ Thomas R. McMillen
District Judge

February 19, 1980

Appendix F-2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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77 B 8999

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY,

Debtor.

In Proceedings For The Reorganization Of A Railroad

ORDER NO. 281B

1. The Court approves abandonment and sale of the following branch lines to the State of Wisconsin: Durand to Eau Claire; Janesville to Avalon; Janesville to Monroe; North Milwaukee to Horicon; Granville to Menomonee Falls; Horicon to Ripon; Cambria to Horicon; Brandon to Markesan; Iron Ridge to Mayville; Mayville to Fond du Lac. The dates of transfer established in the stipulation approved by Order No. 281 may be changed by mutual agreement between the parties.

2. Employees affected by these transactions shall receive protection as required by law from the Estate of the Milwaukee Road, and the State of Wisconsin shall have no liability in connection therewith.

3. The effect of this order shall be stayed for ten (10) days for reconsideration of par. 2.

/s/ Thomas R. McMillen
District Judge

March 10, 1980

Appendix F-3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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77 B 8999

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY,

Debtor.

In Proceedings For The Reorganization Of A Railroad

ORDER NO. 281C

The Railway Labor Executives' Association's motions to alter and amend Order No. 281A, and to reconsider paragraph 2 of Order No. 281B, are denied. Our reasoning in Order No. 297 is relevant here and we reaffirm that decision. In the context of a carrier's sale to a non-carrier purchaser, that purchaser need not be made a party bound by the labor protective conditions imposed upon the abandonment of the carrier's lines. § 5 of the M.R.R.A. was not intended to change that result under existing law.

Moreover, the Wisconsin Dept. of Transportation, the non-carrier purchaser, stated in its application for I.C.C. approval of the acquisitions (and reaffirms in this court) that it has no intention of operating the acquired lines itself. In approving these acquisitions, the I.C.C. also found in each instance that no employees will be adversely affected by the transactions, although some have in fact been so affected. Finally, any subsequent arrangements between the purchaser and its prospective operators are neither regulated by the M.R.R.A. nor directly subject to this court's bankruptcy jurisdiction.

ENTER:

/s/ THOMAS R. MCMILLEN
JUDGE, U.S. DISTRICT COURT

Dated: March 27, 1980
Docketed: March 31, 1980

Appendix F-4

INTERSTATE COMMERCE COMMISSION
DECISION

Finance Docket No. 29237

STATE OF WISCONSIN — ACQUISITION OF CERTAIN LINES OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

Decided: January 30, 1980

On January 15, 1980, the State of Wisconsin, Department of Transportation (WIDOT) filed an application for authority to acquire certain rail lines proposed for abandonment by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road). Under section 5(b)(2) of Public Law 96-101, the Milwaukee Railroad Restructuring Act (MRR), the bankruptcy court may not authorize a sale or transfer of a line of the Milwaukee Road unless an appropriate application has been filed with the Commission. MRR also provides that the bankruptcy court may fix a time within which the Commission must act on the application. By order entered January 21, 1980, the United States District Court for the Northern District of Illinois, Eastern Division (court), set time limits for Commission action on the application.

The WIDOT application divides the rail lines sought to be acquired into three groups (Groups I, II and III), identified in the Appendix to this decision. Group I consists of lines which have been authorized for abandonment by the Commission or recommended for abandonment to the bankruptcy court. Only part of the line in Group II has been recommended for abandonment. No abandonment application has been filed for the lines included in Group III. The court set a deadline of February 1, 1980, for that part of the application to acquire lines in Group I, and a March 1, 1980, deadline for the lines included in Groups II and III.

This application has been filed under MRR section 5(b)(2). In this legislation, Congress mandated emergency measures to be taken

when a railroad is in bankruptcy reorganization, to avoid potential unemployment and damage to the economy of the region and of the Nation from a cessation of rail service. The "emergency measures" include expedited handling of abandonment applications and applications by parties seeking to acquire a rail line. On January 23, 1980, the Commission served Ex Parte No. 282 (Sub-No. 4), *Acquisition Procedures for Lines of Railroads in Reorganization*, which promulgates regulations for expedited processing. These procedures for railroads in reorganization were not in effect at the time WIDOT filed its application and it followed the proposed procedures for all carriers, in Ex Parte No. 282 (Sub-No. 3), *Railroad Consolidation Procedures* (these regulations have not become effective). The information required under both regulations is essentially the same, and the application does provide the information we need to decide whether the proposed acquisition should be approved. Accordingly, we conclude that WIDOT's application is proper and complete.

In addition, section 5(b)(2) of MRR provides that the Commission may act upon an application for sale or transfer of a line of the Milwaukee Road, with or without hearing. In view of the February 1 deadline imposed by the court, we are considering this application without a hearing.

The Group I lines are described as follows:

1. *Sparta-Viroqua (AB-7 (Sub-No. 37))*. This branchline extends south from the Milwaukee Road mainline at Sparta, 34.7 miles through Monroe and Vernon Counties, to a forked terminus in Viroqua. In 1977 there were 7 originating and 743 terminating carloads on the line. Almost 47% of the shipments were agricultural chemicals, with other major commodities being grain mill products, food products, lumber, and nonmetallic minerals. By decision dated August 24, 1979, we postponed issuance of a certificate permitting abandonment in this proceeding for 6 months to allow WIDOT to negotiate purchase of the line.

2. *Monroe-Mineral Point (AB-7 (Sub-No. 49))*. This branchline extends west from Monroe to Gratiot then north to Mineral Point, a distance of 46.7 miles through Green, Lafayette, and Iowa Counties. The line is the westernmost portion of the Janesville-Monroe line listed in Group III of the application. At

Monroe the line crosses an Illinois Central Gulf Railroad Company (I.C.G.) line but does not connect. In 1977 there were 5 carloads originating and 399 carloads terminating on the line. The major commodities received were fertilizer, limestone, and sand and gravel. Pursuant to MRR, a certificate permitting abandonment has not been issued.

WIDOT proposes to contract with a newly formed corporation, the Chicago, Madison and Northern Railroad (CM&N) to operate these first two lines. It is planned that the operator of the lines will seek temporary authority to operate so that there will be no interruption of service.

3. *Milton Junction-Waukesha (AB-7 (Sub-No. 59))*. This segment of the Milwaukee Road extends southwest, from a point near its intersection with the Chicago and North Western Transportation Company's (C&NW) line from Milwaukee to Madison, at Waukesha, to Milton. The Milwaukee Road will continue to operate at Milton, its western terminus, and at Waukesha, its eastern terminus. The line traverses 41.0 miles of mostly agricultural area of southeastern Wisconsin, touching parts of Waukesha, Jefferson, Walworth, and Rock Counties. In 1977 there were 48 carloads originating, 257 carloads terminating (a total of 305 carloads) on the line. The principal outbound commodity was fertilizer. In 1978 the total had dropped to 268 carloads. Pursuant to MRR, a certificate permitting abandonment has not been issued.

WIDOT proposes to continue uninterrupted service on this third line and is now seeking an operator of the line.

4. *Tomahawk-Heafford Junction (AB-7 (Sub-No. 63))*. This segment extends from Tomahawk near the interchange with the Marinette, Tomahawk and Western Railroad Company (MT&W), north 5.7 miles to an interchange with the Soo Line Railroad Company (Soo) at Heafford Junction. In 1977 there were no carloads originating or terminating on the line, since there are no shippers on the line. However, the primary function of this segment is to carry bridge traffic to and from the Soo Line. In 1977 this consisted of 1296 carloads received and 19 forwarded. Pursuant to MRR, a certificate permitting abandonment has not been issued.

5. *Walworth-Avalon (AB-7 (Sub-No. 65))*. This 13.5 mile segment is part of a through route from Chicago to Janesville,

although this particular segment has not been operated in recent years. Walworth, the southern terminus, will continue to be served by the Milwaukee Road and Avalon, which was also not part of the abandonment case, is included in the Janesville-Avalon segment in Group III of this application. On December 26, 1979, we recommended that the court authorize this line for abandonment.

6. *Ripon-Oshkosh (AB-7 (Sub-No. 71F))*. This branchline extends from just north of Ripon at Ripon Junction, northeast for 19.0 miles to Oshkosh. At Oshkosh it connects with the Soo Line and via the Soo Line can connect to the C&NW. The line lies in parts of Fond du Lac and Winnebago Counties. In 1978 there were 307 carloads originated and 330 carloads terminated. The principal outbound commodities were lumber and canned goods. The principal inbound commodities were lumber, food products, fertilizer, scrap metal, paper, and sand and gravel. On December 26, 1979, we recommended that the court authorize this line for abandonment.

Under this proposal, service on the latter three lines will be interrupted and these lines will be railbanked. If in the future there is a need for service over these lines, WIDOT plans to negotiate with an operator to reinstate service.

As noted above, WIDOT does not now propose to operate any of the involved lines but plans to contract in the future for the operation. WIDOT correctly states, and we emphasize, that any operator of the line would have to file an application under 49 U.S.C. § 10901 for a certificate to operate.

In the application, WIDOT proposes a total sum of $8,000,000 in payment for all the lines. The court order of January 21 contains a stipulation entered into between the Bankruptcy Trustee and WIDOT that the court will determine the fair market value of the lines, in accordance with Wisconsin's condemnation laws, Chapter 32 of the Wisconsin Statutes, and the Fifth Amendment to the United States Constitution.

WIDOT will finance this acquisition from money appropriated by the legislature. No new securities will be issued.

CONCLUSIONS

The lines to be acquired in Group I of the application have either been authorized for abandonment or recommended to the court for abandonment. These lines are not included in the reorganization plans which have been filed with the Commission, and no other offers to purchase or operate the lines have been filed. Accordingly, we conclude that service on these lines will, in all likelihood, not continue unless WIDOT is allowed to acquire these lines. Once acquired, WIDOT will be in a position to contract to continue or reinstate service. As noted above an operator must file an application for a certificate to operate over a line.

We find that the proposed acquisition is in the public interest, that it will facilitate continuation of rail transportation to the public, and that the fixed charges will be set by the court.

We further find that no employees will be adversely affected.

This action does not significantly affect the conservation of energy resources.

It is ordered:

The proposed acquisitions discussed in this decision (identified in Group I of the Appendix) are approved. This decision shall be effective on the date it is served, and unless the transaction is consummated within 1 year from the effective date, the decision shall be of no further force. Applicant shall notify the Commission within 30 days of consummation of the transaction.

By the Commission, Chairman Gaskins, Vice Chairman Gresham Commissioners Stafford, Clapp, Trantum, and Alexis. Commissioner Alexis absent and not participating.

AGATHA L. MERGENOVICH
Secretary.

(SEAL)

F. D. No. 29237

APPENDIX

ICC Docket No.	*Name of the Line*	*Miles*
	GROUP I — To be decided by February 1, 1980.	
AB-7		
Sub. No.		
37	Sparta-Viroqua	32.2
49	Monroe-Mineral Point	46.7
59F	Milton Junction-Waukesha	41.0
63F	Tomahawk-Heafford Jct.	5.7
65F	Walworth-Avalon	13.5
71F	Ripon Junction-Oshkosh	18.7
	GROUP II — To be decided by March 1, 1980.	
AB-7		
Sub. No.		
60F	Mayville-Fond du Lac	18.7
	GROUP III — To be decided by March 1, 1980.	
	Durand-Eau Claire	32.4
	Janesville-Avalon	5.8
	Janesville-Monroe	34.0
	Northern Division	
	North Milwaukee-Horicon	46.4
	Granville-Menomonee Falls	3.6
	Horicon-Ripon	30.3
	Cambria-Horicon	30.7
	Brandon-Markesan	11.6
	Iron Ridge-Mayville	7.0
	TOTAL MILES ALL GROUPS	378.6

Appendix F-5

INTERSTATE COMMERCE COMMISSION
DECISION

Finance Docket No. 29237

STATE OF WISCONSIN — ACQUISITION OF CERTAIN LINES OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

Decided: February 28, 1980

On January 30, 1980, we granted a part of the application of the State of Wisconsin, Department of Transportation (WIDOT) for authority to acquire certain rail lines of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road). The lines approved for transfer in that decision are identified in Group I of the Appendix to this decision. This group consists of lines which had been authorized for abandonment by the Commission or recommended for abandonment to the bankruptcy court.

The application has been filed under 5(b)(2) of Public Law 96-101, the Milwaukee Railroad Restructuring Act (MRR). MRR authorizes the bankruptcy court to fix a time within which the Commission must act on an application for sale or transfer of a line of the Milwaukee Road. By order entered January 21, 1980, the United States District Court for the Northern District of Illinois, Eastern Division (Court), set time limits for Commission action on the application.

The WIDOT application divides the rail lines sought to be acquired into three groups (Groups I, II, and III), identified in the Appendix. Groups II and III are being considered here. Only part of the line in Group II has been recommended for abandonment. No abandonment application has been filed for the lines included in Group III. The Court set a deadline of March 1, 1980, for that part of the application to acquire the lines included in Groups II and III.

In view of the March 1 deadline imposed by the court, we are considering the application without a hearing.[1] The lines included in this part of the application are described below. The bankruptcy court stated in the order dated January 21, that the lines in Group II and III would "almost certainly be approved for abandonment by the Court . . ."

1. *Iron Ridge-Fond du Lac*, AB-7 (Sub-No. 60F). This branch line extends north from Iron Ridge to Fond du Lac, on the Milwaukee's North Milwaukee-Cambria branchline, a distance of 25.7 miles in Dodge and Fond du Lac Counties. It connects with the Chicago and North Western Transportation Company (C&NW) and Soo Line Railroad Company (Soo) at Fond du Lac. In 1978 there were 2983 carloads originating and 978 carloads terminating on the line. The major outbound commodity was lime and limestone rock and the major inbound commodities were grain mill products, fertilizer, paper board, automotive parts, and scrap metal. The Commission has recommended to the bankruptcy court that the segment from Mayville to Fond du Lac be abandoned but did not recommend abandonment of the Mayville to Iron Ridge segment.

WIDOT contends that this line is an integral part of the lines known as the "Northern Division," and proposes to continue uninterrupted service on this line. It is negotiating with several operators to continue service when Milwaukee stops operating on June 30, 1980.

2. *Durand-Eau Claire*. This 32.4-mile segment is part of a line which originally ran from Eau Claire southwest across the Mississippi River to connect to the Milwaukee Road's mainline. In 1978 there were 1603 carloads originated and 1063 carloads terminated on the Durand to Eau Claire segment, almost all at Durand and Eau Claire. The principal outbound commodities were food and paper products, and the principal inbound commodities were food products and fertilizer. Connection to the Milwaukee Road system is presently provided via trackage rights on the C&NW from E. St. Paul to Eau Claire.

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[1] Section 5(b)(2) of MRR provides that the Commission may act upon an application for sale or transfer of a line of the Milwaukee, with or without hearing.

WIDOT plans to continue uninterrupted service over this line and is negotiating with Trans Northern, Inc. In a letter to the Commission, dated February 1, 1980, Trans Northern, Inc. provided information about its corporate structure, railroad management skills, and its plans to create a subsidiary, Chippewa River Railroad, to operate the line. The operator will apply for a certificate from the Commission, and in addition, will seek a Car Service Order so that operations can commence either April 1 or 15, 1980.

3. *Janesville-Avalon*. This 5.8 miles segment is a portion of a former mainline track between Chicago and Madison. At Avalon it connects with the Walworth-Avalon line which was approved for acquisition by WIDOT in our prior decision. At Janesville the Milwaukee Road will continue to operate. In 1978 there were 219 carloads originated or terminated at Avalon, most of which were outbound grain.

4. *Janesville-Monroe*. This segment of branch line extends west from Janesville 34.0 miles through parts of Rock and Green Counties to Monroe. There the line continues on to Mineral Point; that segment was authorized for transfer to WIDOT in our prior decision. In 1978 there were 73 carloads originated and 1752 carloads terminated on the Janesville-Monroe line. The majority of the 1978 outbound traffic was logs. The primary inbound commodities were sand and gravel, paper, and fertilizer and lesser amounts of lumber and food products.

The operational plans for the above two lines are similar. The Chicago, Madison and Northern Railway Company (CM&N) has filed an application under 49 U.S.C. § 10901 for a certificate of public convenience and necessity to operate the line from Janesville to Mineral Point.[2] Under the proposal, the right-of-way will be purchased by WIDOT and leased for a ten year period to the Pecatonica Transit Commission, which will own the tracks and track material. The line will be operated by CM&N. The merits of the proposed operation will be considered in that application proceeding; however,

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[2] This operation includes the Janesville-Monroe segment described in No. 4 above, as well as the Monroe-Mineral point [*sic*] segment in No. 2 of Group I in the part of the application which has been granted.

the proposal is relevant to our consideration of this application, because it indicates how the line will be used.

CM&N has applied for a Car Service Order so that it can begin operating over the Janesville-Monroe line immediately. On June 30, 1980, when Milwaukee is expected to stop operating over the Janesville-Avalon line, WIDOT plans for CM&N to continue service. We note that an application must be submitted for the operating authority.

5. *North Milwaukee-Cambria, Ripon, Markesan, and Menomonee Falls.* This system of lines extend from about 37th Street at North Milwaukee to Horicon, a distance of 46.4 miles,[3] where a 30.7-mile branch goes to Cambria (formerly to Portage)[4] and another 30.3-mile branch goes to Ripon.[5] At Granville a 3.8-mile branch goes to Menomonee Falls[6], at Brandon an 11.6-mile branch goes to

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[3] In 1978 there were 835 carloads originated, 813 carloads terminated on the segment, and 1083 carloads of connecting traffic at Slinger. The primary commodities were food products, printed material, pulp products, fertilizer and primary metals.

[4] This segment extends northwest, from Horicon in Dodge County, 26.3 miles to Cambria in Columbia County. There are spurs to Fox Lake and Beaver Dam which increase the total mileage to 30.7 miles. In 1978, 1278 carloads originated and 1038 carloads terminated on the line. The principal commodities shipped were farm products, food products, lumber, and machinery. The principal commodities received were food products, lumber, clay-concrete, primary metals, and metal products.

[5] This segment extends north from Horicon, on the North Milwaukee-Portage branch line, to Ripon, a distance of 30.3 miles in Dodge and Fond du La [*sic*] Counties. In 1978, 363 carloads originated and 1035 carloads terminated on the line. The major outbound commodities were food products, metal products, and machinery. The major inbound commodities were coal, food products, paper products, fertilizer, primary metals, and metal products.

[6] This branchline extends from Granville, in the extreme northwest corner of Milwaukee County, west for 3.6 miles to Menomonee Falls in Waukesha County. The line formerly extended as far west as North Lake. The North Lake to Merton section was abandoned in 1970, and the Merton to Menomonee Falls section was abandoned in December 1976. A steam tourist train

Markesan,[7] and at Beaver Dam Junction a 2.0-mile spur penetrates Beaver Dam. There are connections with the C&NW at Ripon, Burnett, Minnesota Junction, and Granville, and with Soo Line at Slinger. The total mileage is 123.7 miles. In 1978 there were 5648 carloads originated and 3195 carloads terminated on these lines. The primary commodities were canned goods, fertilizer, lumber, paper products, coal, and steel.

WIDOT plans to have uninterrupted service over these lines and is negotiating with several operators to continue service after Milwaukee ceases operating the lines on June 30, 1980.

As we noted in our January 30 decision, WIDOT proposes a total sum of $8,000,000 in payment for all the lines. The court order of January 21 contains a stipulation entered into between the Bankruptcy Trustee and WIDOT that the court will determine the fair market value of the lines, in accordance with Wisconsin's condemnation laws, Chapter 32 of the Wisconsin Statutes, and the Fifth Amendment to the United States Constitution. WIDOT will finance this acquisition from money appropriated by the legislature. No new securities will be issued.

CONCLUSIONS

The court stated in the January 21 decision, that the lines included in Groups II and III of the application will almost certainly be approved for abandonment, in view of Milwaukee's financial condition, the Trustee's designation of these lines for abandonment, WIDOT's lack of opposition and WIDOT's development of prog-

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presently operates on the western extremity of the abandoned line. In 1978 43 carloads originated and 121 carloads terminated on the line. The principal inbound commodity was paper products, and the principal outbound commodity was paper products and primary metals.

[7] This branchline extends from Brandon, midway between Ripon and Waupun on the Milwaukee Road's Horicon-Ripon branchline, west for 11.6 miles to Markesan. In 1978 there were 1115 carloads originated and 188 carloads terminated on the line. The major outbound commodity was food products, and the major inbound commodities were fertilizer, fabricated metal products, and food products.

rams to provide alternative railroad service. In addition, these lines are not included in the reorganization plans which have been filed with the Commission, and no other offers to purchase or operate the lines have been filed. We conclude that service on these lines in all likelihood will not continue unless WIDOT is allowed to acquire these lines.

WIDOT has supplied general information concerning negotiations for continued service and, where available, specific information about the operator and the nature of the service to be provided, subject to our approval.

We find that the proposed acquisition is in the public interest, that it will facilitate continuation of rail transportation to the public, and that the fixed charges will be set by the court.

We further find that no employees will be adversely affected.

This action does not significantly affect the conservation of energy resources.

It is ordered:

The proposed acquisitions discussed in this decision (identified in Group [*sic*] II and III of the Appendix) are approved. This decision shall be effective on the date it is served, and unless the transaction is consummated within 1 year from the effective date, the decision shall be of no further force. Applicant shall notify the Commission within 30 days of consummation of the transaction.

By the Commission, Chairman Gaskins, Vice Chairman Gresham Commissioners Stafford, Clapp, Trantum, and Alexis.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

F. D. No. 29237

APPENDIX

ICC Docket No.	*Name of the Line*	*Miles*
	GROUP I — Approved January 30, 1980.	
AB-7		
Sub. No.		
37	Sparta-Viroqua	32.2
49	Monroe-Mineral Point	46.7
59F	Milton Junction-Waukesha	41.0
63F	Tomahawk-Heafford Jct.	5.7
65F	Walworth-Avalon	13.5
71F	Ripon Junction-Oshkosh	18.7
	GROUP II — To be decided by March 1, 1980.	
AB-7		
Sub. No.		
60F	Mayville-Fond du Lac	18.7
	GROUP III — To be decided by March 1, 1980.	
	Durand-Eau Claire	32.4
	Janesville-Avalon	5.8
	Janesville-Monroe	34.0
	Northern Division	
	North Milwaukee-Horicon	46.4
	Granville-Menomonee Falls	3.6
	Horicon-Ripon	30.3
	Cambria-Horicon	30.7
	Brandon-Markesan	11.6
	Iron Ridge-Mayville	7.0
	TOTAL MILES ALL GROUPS	378.6

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

In re Chicago, Milwaukee,
St. Paul & Pacific Railroad Co., 7th Cir.
Nos. 80-1347, 80-1348,
80-1545 and 80-1546

APPEALS OF

Railway Labor Executives' Association

JUDGMENT

Opinion by Judge Wood

JUDGMENT — ORAL ARGUMENT
UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

August 17, 1981.

Before
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. WESLEY E. BROWN, Senior District Judge*

Nos. 80-1347, 80-1348, 80-1545, 80-1546

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY,

Debtor.

CONSOLIDATED APPEALS OF: RAILWAY LABOR
EXECUTIVES' ASSOCIATION,

Intervenor.

STATE OF WISCONSIN DEPARTMENT OF
TRANSPORTATION, STATE OF SOUTH DAKOTA,
PORT OF PEND OREILLE, PEND OREILLE
VALLEY RAILROAD COMPANY, INC., and
SEATTLE AND NORTH COAST RAILROAD COMPANY,

Intervening Appellees.

Appeals from the United States
District Court for the
Northern District of Illinois,
Eastern Division

No. 77-B-8999
THOMAS R. MC MILLEN, Judge

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*Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs on appeal to the Trustee, in accordance with the opinion of this Court filed this date.

Opposition

1

Office - Supreme Court, U.S.
FILED
FEB 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1250

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

vs.

RICHARD B. OGILVIE, Trustee of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION; STATE OF SOUTH DAKOTA; PORT OF PEND OREILLE; PEND OREILLE VALLEY RAILROAD COMPANY, INC.; SEATTLE & NORTH COAST RAILROAD COMPANY; FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; GIRARD BANK, as Indenture Trustee; HARRIS TRUST AND SAVINGS BANK, as Indenture Trustee; and the CHICAGO MILWAUKEE CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF MILWAUKEE ROAD RESPONDENTS

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Date: February 17, 1982

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I. QUESTIONS PRESENTED:

In the opinion of the Milwaukee Road Respondents* the following questions are presented by the RLEA's petition:

1. Does the traditional and broad discretion of a railroad reorganization court to defer payment of claims against a railroad in reorganization allow deferral of *Oregon Short Line*** labor protection claims during the reorganization when Congress has legislated an alternate scheme which includes immediate payment of reduced labor protection benefits and when deferral is required to effectuate reorganization?

2. Did the courts below correctly find that if Section 5 of the Milwaukee Railroad Restructuring Act had been intended to change the labor protection applied in abandonments of lines followed by sales to non-carriers for continued rail operation it would have done so explicitly?

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* The Milwaukee Road Respondents include Richard B. Ogilvie, Trustee of the Property of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Debtor; The First National Bank of Chicago, as Indenture Trustee; Girard Bank, as Indenture Trustee; Harris Trust and Savings Bank, as Indenture Trustee; Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Debtor; and the Chicago Milwaukee Corporation, which is the corporate parent of the debtor. Lists of parent companies, subsidiaries and affiliates are attached as Appendix A hereto.

** See p. 5, *infra*.

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No. 81-1250

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

vs.

RICHARD B. OGILVIE, Trustee of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION; STATE OF SOUTH DAKOTA; PORT OF PEND OREILLE; PEND OREILLE VALLEY RAILROAD COMPANY, INC.; SEATTLE & NORTH COAST RAILROAD COMPANY; FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; GIRARD BANK, as Indenture Trustee; HARRIS TRUST AND SAVINGS BANK, as Indenture Trustee; and the CHICAGO MILWAUKEE CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF MILWAUKEE ROAD RESPONDENTS

Respondents RICHARD B. OGILVIE ("Trustee"), Trustee of the Property of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; GIRARD BANK, as Indenture Trustee; HARRIS TRUST AND SAVINGS BANK, as Indenture Trustee; CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, Debtor; and the CHICAGO MILWAUKEE CORPORATION (collectively "Milwaukee Road Respondents"), respectfully request that this

Court deny Petitioner Railway Labor Executives' Association's ("RLEA") petition for a writ of certiorari in the above proceeding.

OPINIONS BELOW AND JURISDICTION

The Milwaukee Road Respondents adopt those portions of the Petition entitled "Opinions Below" and "Jurisdiction."

STATUTES INVOLVED

The Milwaukee Road Respondents adopt that portion of the Petition entitled "Statutes Involved," but add that this case involves questions concerning the discretion of a United States District Court sitting as a Railroad Reorganization Court under Section 77 of the Bankruptcy Act of 1898, as amended, 11 U. S. C. § 205 (1976) (repealed effective 1979). Relevant portions of this statute are reproduced in Appendix A hereto.

STATEMENT OF THE CASE

I. The Milwaukee Road Bankruptcy.

After incurring losses of over $100,000,000 in 1975 through 1977, the Milwaukee Road[1] entered reorganization on December 19, 1977.[2] In 1978, the Milwaukee lost $82 million from operations and was losing money at twice that level in 1979, maintaining operations by borrowings under Section 77(c)(3). By the Fall of 1979, both the United States Court of Appeals for the Seventh Circuit[3] and the Reorganization Court[4] had determined the Milwaukee to be cashless,[5] restricted borrowings[6] to a potentially reorganizable core and embargoed operations on non-core lines as of November 1, 1979.[7] Employees working on these non-core lines and operations were "furloughed"—that is, they were laid off without any further pay and without any employee protection.[8]

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[1] The Chicago, Milwaukee, St. Paul & Pacific Railroad Company shall hereinafter be referred to as "Milwaukee" or "Milwaukee Road;" the United States District Court for the Northern District of Illinois, Eastern Division, the Honorable Thomas R. McMillen presiding in case No. 77 B 8999 as the "Reorganization Court;" Chapter VIII of the Bankruptcy Act of 1898, as amended, 11 U.S.C. § 205 (1976) (repealed effective 1979) as "Section 77;" orders of the Reorganization Court as "Orders" and *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 611 F.2d 662, 665 (7th Cir. 1979) as *"Embargo Decision."*

[2] The Milwaukee Road reorganization proceeding continues to be governed by Section 77, with certain modifications not pertinent to this Petition. Pub. L. No. 95-598 § 403, 92 Stat. 2549 (Nov. 6, 1978).

[3] *Embargo Decision* at 668.

[4] Order No. 220C, Appendix to Brief of Milwaukee Road Respondents at 11b.

[5] *See In re Penn Central Transportation Co.*, 384 F. Supp. 895, 919 n. 31 (Sp. Ct. R. R. R. Act 1974) (defining "cashlessness").

[6] Section 77(c)(3).

[7] Order No. 220C, Appendix to Brief of Milwaukee Road Respondents at 11b.

[8] Order No. 220C Appendix to Brief of Milwaukee Road Respondents at 12b.

II. The Milwaukee Railroad Restructuring Act and the Section 9 Agreement

When the Milwaukee's non-core lines were embargoed, Congress intervened and passed the Milwaukee Railroad Restructuring Act ("MRRA"). 45 U. S. C. §§ 901-22 (Supp. III 1979). The MRRA is designed to "assure a prompt and workable method for reorganizing the Milwaukee Railroad by permitting sales of lines to other carriers and by providing an affordable method of employee protection which will not erode the estate." 125 Cong. Rec. H10212-13 (Daily ed. November 2, 1979) (remarks of Rep. E. Madigan).

At the time of the passage of the MRRA, abandonments of service by railroads required lengthy proceedings before and approval by the Interstate Commerce Commission ("ICC").[9] Section 5(a) of the MRRA, 45 U. S. C. § 904(a), provides an expedited method of abandoning Milwaukee Road lines by authority of the Reorganization Court. All of the lines involved in this case were abandoned under Section 5(a).

Section 5(a)(1) requires provision of "a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49 of the United States Code." Protections required by the ICC in abandonments vary to fit the circumstances.[10] *See, e.g., New York Dock Railway* v. *United States,* 609 F. 2d 83, 91-92 (2d Cir. 1979) (upholding imposition of wages and fringe benefits for up to six years but noting that benefits may vary); *Wellsville, Addison & Galeton Railroad Corp.,—Abandonment,* 354 I. C. C. 744 (1978) (no protection). In typical abandonments, however, *"Oregon Short*

[9] Section 77(o); Interstate Commerce Act, 47 U.S.C. §§ 10903-06 (Supp. III 1979).

[10] Abandonments other than those governed by special statutes, such as MRRA, are carried out under 49 U.S.C. § 10903 (Supp. III 1979). Section 10903(b)(2) requires protective conditions at least as beneficial to the interest of employees as those established under § 11347.

Line"[11] conditions are imposed. These provide for maintenance of an employee's wage and benefit levels for a period of six years as well as certain other benefits. Estimates of *Oregon Short Line* claims which would arise out of the abandonment of all Milwaukee non-core operations varied from $300 million to $1.2 billion with the most likely estimate being $350 million. *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 658 F. 2d 1149, 1156 (7th Cir. 1981) (*"In re Chicago, Milwaukee"*), Appendix to Petition at 11a. This liability would have precluded any attempt to reorganize any part of the railroad, *id.*, and payments to employees for labor protection would have been delayed while the question of their validity was litigated through the courts. *See Railway Labor Executives' Association* v. *Gibbons*, 448 U. S. 1301 (Stevens, Circuit Justice, 1980), *stay denied per curiam*, 448 U. S. 909 (1980), *cert. granted*, ____ U. S. ____, 101 S. Ct. 2014 (1981). Neither the public interest in continued rail service nor the interest in protecting rail employees from the hardships of being laid off would have been served.

Sections 9 and 15 of the MRRA, 45 U. S. C. §§ 908, 914 (Supp. III 1979), offered a solution to this problem. The MRRA required the Trustee and the Milwaukee Road's labor organizations to enter into an employee protection agreement. The MRRA provided that claims of employees under this agreement would be treated as administrative expenses, it limited the total liability of the estate thereunder to $75 million, and it provided for a government loan of the amounts needed.

The Trustee and the labor organizations negotiated such an agreement ("Section 9 Agreement"). It provides Milwaukee employees losing employment as a result of restructuring transactions, including abandonments, sales, and em-

[11] *Oregon Short Line R.R.—Abandonment*, 360 I.C.C. 91 (1979). See also *New York Dock Ry.—Control*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

bargoes, with the option of taking an immediate cash payment of up to $25,000 in lieu of other protective benefits which might be available.

III. The Abandonment Orders.

All of the transactions in this case involve orders of the Reorganization Court authorizing abandonments of Milwaukee Road lines under section 5(a) of the MRRA. In connection with each of these abandonments, the Reorganization Court provided *Oregon Short Line* protections for the benefit of Milwaukee Road employees, with certain modifications not at issue in this petition. *See, e.g.*, Order No. 276C, Appendix to Petition at 57a. Given the availability of Section 9 Agreement benefits, the Reorganization Court found that deferral of payment of monetary benefits was within traditional railroad reorganization court powers, consistent with the congressional intent underlying the MRRA and necessary for the continued progress of the reorganization. *See, e.g.*, Order No. 276B, Appendix to Petition at 54a. Therefore, the Reorganization Court ordered payment deferred during the reorganization proceeding. *See, e.g.*, Order No. 307A, Appendix to Petition at 91a-92a.

IV. The Sales

The Trustee was able to arrange sales of certain lines to purchasers who were not common carriers but who intended to seek certificates of convenience and necessity from the ICC to operate the lines as common carriers or to obtain operators for the lines.[12] These sales were carried out under the MRRA in the same way as they would be carried out under the Interstate Commerce Act—that is: abandonment of the line, with labor protection for Milwaukee employees adversely affected, followed by a sale of the line to the non-carrier. No obligation to protect Milwaukee employees was imposed on the States or

[12] The Trustee was also able to arrange sales of lines to common carriers for continued rail operation. Those sales are not at issue here.

acquiring non-carrier. Neither are the States or acquiring non-carriers bound by the Milwaukee Road's collective bargaining agreements.

REASONS FOR DENYING THE WRIT

I. Deferral Of Payment Of *Oregon Short Line* Claims

A. The Statutory Context Is Unique To This Case And The Decision Of The Court Of Appeals Was Specifically Limited To Its Facts

The questions presented by the RLEA's petition revolve solely around the MRRA whose labor protection scheme applies, by its terms, to only one case—the Milwaukee Road reorganization. The Seventh Circuit recognized this and so limited its holding:

> . . . our holding that payment of traditional benefits here cannot be classifiable as an administrative expense is limited to instances where the facts are similar to those present here *and* where Congress has also addressed the issue (here under the MRRA).

In re Chicago, Milwaukee at 1157, Appendix to Petition at 13a-14a (footnote omitted). It was in this restricted context that the Seventh Circuit concluded that payment of *Oregon Short Line* benefits could be deferred during the Milwaukee Road reorganization proceeding.

> Accordingly, we conclude that, under these facts and where Congress has so directed, . . . [t]heir payment must be deferred.

Id. at 1160, Appendix to Petition at 19a.

While, as RLEA notes, some of the language in Section 5 of the MRRA also appears in the Interstate Commerce Act, as amended by Section 227 of the Staggers Rail Act of 1980, Pub. L. No. 96-498, 94 Stat. 1895, 1931, codified at 11 U. S. C. §§ 1170, 1172(b) (Supp. IV 1980), there is no provision in the

Staggers Rail Act nor the Interstate Commerce Act for the adoption of an alternative form of labor protection providing immediate payment such as the Section 9 Agreement. The immediate availability of Section 9 Agreement benefits was crucial to the Seventh Circuit's decision. The statutory context is, therefore, unique to this case. No purpose would be served by review in this Court of so limited a holding.

B. The Decision Below Does Not Conflict With Decisions Of This Or Any Other Court

This Court has consistently recognized that a railroad reorganization court has unusually broad discretionary powers over the conduct of the reorganization proceeding and the conduct of the bankrupt railroad's business in order to bring about reorganization of a railroad as a viable enterprise.[13] *See, e.g., Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Railway Co.*, 294 U. S. 648, 675-76 (1935) ("*Continental Bank*"). This Court and courts of appeals have consistently recognized that payment of claims extant at the time the petition for reorganization is filed may be deferred. *Id.* at 676-77; *In re Boston and Maine Corp.*, 600 F. 2d 307, 310-13 (1st Cir. 1979). Courts have also consistently recognized that payment of claims arising after the petition is filed may be deferred in the interest of the reorganization, including those with cost of administration status. *See, e.g., In re Penn Central Transportation Co.*, 553 F. 2d 12, 16 (3d Cir. 1977) (post-reorganization interline accounts); *In re Penn Central Transportation Co.*, 452 F. 2d 1107, 1109 (3d Cir. 1971), *cert. denied*, 406 U. S. 944 (1972) (payment of current

[13] RLEA argues that *Reading Co.* v. *Brown*, 391 U.S. 471 (1968) is to the contrary. However, *Reading* involved the priority of claims in connection with a bankrupt storage company whose sole asset—a warehouse—had burned down. There was no ongoing business to be preserved. The special duties of a railroad reorganization court to preserve rail service in the public interest were not involved. Therefore, *Reading* is inapposite.

taxes); *In re Penn Central Transportation Co.*, 400 F. Supp. 920, 925-26 (E. D. Pa. 1975) (operating expenses). *Cf. In re Penn Central Transportation Co.*, 484 F. 2d 1300, 1304-05 (3d Cir. 1973), *cert. denied*, 415 U. S. 951 (1974) (reduction of unfunded pension liability upheld as an equitable exercise of court's discretion).[14]

In short, the Seventh Circuit's decision is consistent with the decisions of this and other courts. There is no need for this Court to review the decision to resolve a conflict between courts.

C. The Writ Should Not Be Granted Simply To Review The Reorganization Court's Exercise Of Its Discretion

Since the Reorganization Court clearly had the discretion to defer payment of *Oregon Short Line* claims, RLEA is really asking that this Court substitute its judgment for that of the courts below. This is not sufficient reason for granting a writ of certiorari, particularly as there is no real dispute as to the factual findings in this case. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949).

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[14] The only area where there is some dispute as to the discretion of the Reorganization Court is in the area of interline per diem account settlements. Compare *In re Chicago, Rock Island & Pacific Railroad Co.*, 537 F.2d 906 (7th Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977) with *In re Boston & Maine Corp.*, 600 F.2d 307 (1st Cir. 1979).

RLEA additionally contends that the Seventh Circuit's decision below goes contrary to the recognition of the importance of railway labor embodied in such decisions as *United States* v. *Lowden*, 308 U.S. 225 (1939). On the contrary, the Seventh Circuit found that the MRRA was specifically drafted and enacted to meet those concerns and that the provision of immediate, certain benefits to adversely affected employees fulfilled that policy. *In re Chicago, Milwaukee* at 1160-61, Appendix to Petition at 20a-21a. Therefore, the decision is consistent with *Lowden*.

This Court stated in *Continental Bank* at 677:

> a claim [by a creditor] that injurious consequences will result . . . may not, of course, be disregarded by the district court; but it represents a question addressed not to the power of the court but to its discretion—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised.

This is not a case for such interference.

D. Deferral Is Required By The MRRA

Congress conceived of the MRRA as assuring "a prompt and workable method for reorganizing the Railroad by providing an affordable method of employee protection which will not totally erode all the assets of the Milwaukee Estate." *In re Chicago, Milwaukee* at 1158, Appendix to Petition at 16a (quoting Rep. Madigan). In order for the congressional scheme to work, payment of traditional benefits must be deferred. *Oregon Short Line* benefits are substantially greater than those available under the Section 9 Agreement. If payment of *Oregon Short Line* benefits is not deferred, employees will elect them rather than Section 9 Agreement benefits. *Id.* at 1159, Appendix to Petition at 17a-18a. Such election would erode the assets of the estate and destroy the possibility of a reorganization. The Seventh Circuit properly interpreted the statute to effectuate its purposes. *Id.* at 1160, Appendix to Petition at 19a.

II. The MRRA Does Not Change The Established Rule That Acquiring Non-carriers Of Abandoned Rail Lines Are Not Required To Protect Employees Of The Abandoning Railroad.[15]

The statutory scheme of the MRRA parallels that of the Interstate Commerce Act, 49 U. S. C. §§ 10903, 11347 (Supp. III 1979), with respect to abandonments and sales of the

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[15] This issue is treated in depth in the Briefs in Opposition by the State of South Dakota, the State of Wisconsin, the Port of Pend Oreille, the Pend Oreille Valley Railroad Company, Inc., and the Seattle and North Coast Railroad Co.

Milwaukee Road's rail lines. There is a separate provision for approval of each type of transaction. Section 5 of the MRRA transfers final authority over each type of transaction from the ICC to the Reorganization Court.

Since shortly after the Transportation Act of 1920 gave the ICC jurisdiction over abandonments and sales of rail lines, it has been consistently held that sales of railroad lines to non-carriers for rail use are carried out through the abandonment procedure followed by sale to the acquiring non-carrier. The acquiring non-carrier then applies to the ICC for a certificate of convenience and necessity to operate the line as a common carrier. *See People ex rel. Illinois* v. *United States,* 604 F. 2d 519 (7th Cir. 1979) *cert. denied,* 445 U. S. 951 (1980) (and cases cited therein). Responsibility for protection of employees adversely affected by the abandonment is placed solely on the abandoning carrier and the acquiring non-carrier is not bound by the carrier's collective bargaining agreements. *Id. See also Durango and Silverton Narrow Gauge Railroad Co.—Acquisition and Control,* ICC Fin. Doc. No. 29096 (Unpublished Decision December 19, 1980), Appendix to Brief of Milwaukee Road Respondents at 13b.

The RLEA's argument flies in the face of the consistent practice prior to enactment of the MRRA, as well as the intent of the MRRA to facilitate sales for continued rail use. The Seventh Circuit properly found that if Congress had intended to change the established treatment of labor protection in these transactions, it would have done so explicitly. *In re Chicago, Milwaukee* at 1171, 1175, Appendix to Petition at 42a, 50a-51a.

CONCLUSION

For the above reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

The Milwaukee Road Respondents comprise Richard B. Ogilvie, as Trustee of the Property of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Debtor; The First National Bank of Chicago, as Indenture Trustee; Girard Bank, as Indenture Trustee; Harris Trust and Savings Bank, as Indenture Trustee; the Chicago, Milwaukee, St. Paul and Pacific Railroad Company as Debtor and the Chicago Milwaukee Corporation, which is the corporate parent of the Debtor. Parent companies, subsidiaries and affiliates of the Milwaukee Road Respondents are as follows:

A. Richard B. Ogilvie as Trustee of the Property of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Debtor.

Prior to reorganization proceedings, the Chicago Milwaukee Corporation was the parent of the Debtor owning approximately 96% of its common and preferred stock. The Trustee is vested with title to the assets of the Milwaukee Road and is empowered to operate its business and otherwise deal with its assets and properties, subject to the jurisdiction of the Reorganization Court. It is the Trustee's opinion that Chicago Milwaukee Corporation and its subsidiaries are neither parent nor affiliates because the Property of the Milwaukee Road is controlled by the Trustee and the Reorganization Court rather than Chicago Milwaukee Corporation.

B. Chicago, Milwaukee, St. Paul and Pacific Railroad Company as Debtor.

PARENT

Chicago Milwaukee Corporation

AFFILIATES

Chicago Union Station Company
Indiana Harbor Belt Railroad Company
Kansas City Terminal Railway Company
The Minnesota Transfer Railway Company
Minneapolis Eastern Railway Company
The Pullman Company
Trailer Train Company
Longview Switching Company
Northern Tier Pipeline Company

SUBSIDIARIES

Chicago, Terre Haute and Southeastern Railroad Company
Davenport, Rock Island and North Western Railway Company
DesMoines Union Railway Company
Milwaukee Land Company
The Milwaukee Motor Transportation Company
Bremerton Freight Car Ferry, Inc.
MTI, Inc.
Washington, Idaho and Montana Railway Company
MLC Equipment Company
MNT, Inc.

C. Chicago Milwaukee Corporation

SUBSIDIARIES

Aslesen Company
Chicago, Milwaukee, St. Paul & Pacific
Railroad Company as Debtor
Hanson Porcelain Co., Inc.
Hi-Way Paving, Inc.
Southern Boiler & Tank Works, Incorporated
Vulcan-Hart Corporation

D. Harris Trust and Savings Bank

PARENT

Harris Bankcorp, Inc.

AFFILIATES

Harriscorp Finance, Inc.
Harris Trust Company of Arizona
International Pacific Corporation (Holdings)
Pty. Limited

E. The First National Bank of Chicago

PARENT

First Chicago Corporation

PRINCIPAL SUBSIDIARIES

Network EFT, Inc.
International Commercial Bank Limited
N. V. Slavenburg's Bank

PRINCIPAL AFFILIATES

First Chicago Cheque Corporation
First Chicago Trust Company of Arizona
First Chicago Realty Services Corporation
First Capital Corporation of Chicago
First Chicago Fiduciary and Investment Services Corporation
First Chicago Overseas Finance N. V.
First Chicago Financial Corporation
First Chicago Credit Corporation
Real Estate Research Corporation
First Chicago Lease Holdings, Inc.
UBAF Arab American Bank

F. Girard Bank

PARENT

Girard Company

SUBSIDIARIES

Girard International Bank
G.T.C. Management Inc.

SUBSIDIARIES OF GIRARD COMPANY

Girard Zurich A.G.
Girard Leasing Corporation
Girard Financial Corporation
Girard Realty Corporation
Girard Services, Inc.
Giraco Life Insurance Company
Girard Bank Delaware

SUBSIDIARIES OF GIRARD BANK DELAWARE

Far Banks Holding Company
Wilparap Company

APPENDIX B

STATUTES AND UNPUBLISHED OPINIONS RELIED UPON

BANKRUPTCY ACT OF 1898, 11 U.S.C. § 205 (1976)

[relevant subsections thereof set forth below.]

§ 205. Reorganization of railroads engaged in interstate commerce

(a) Petition for reorganization by railroad, subsidiary or creditors; venue; proceedings thereon; jurisdiction of court over debtor and property

Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction the corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission"). When any railroad, although engaged in interstate commerce, lies wholly within one State, the proceedings shall be brought in the United States district court for the district in which its principal operating office has been located during the preceding six months or the greater portion thereof. The petition shall be accompanied by payment to the clerk of a filing fee of $150. Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied. If the petition is so approved, the court in which the order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive

jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a court of the United States would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district. The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in which the proceeding is pending, and any other rules which it may deem advisable in order to aid district courts and courts of appeal in exercising the jurisdiction herein conferred upon them. The railroad corporation shall be referred to in the proceedings as a "debtor". Any railroad corporation the majority of the capital stock of which having power to vote for the election of directors is owned, either directly or indirectly through an intervening medium, by any railroad corporation filing a petition as a debtor may file, with the court in which the other debtor has filed such a petition, and in the same proceeding, a petition, a copy of which shall also be filed at the same time with the Commission, stating that it is insolvent or unable to meet its debts as they mature, and that it desires to effect a reorganization in connection with, or as a part of the plan of reorganization of the other debtor; and upon the filing of the petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it if not so satisfied, and thereupon the court, if it approves the petition, shall have the same jurisdiction with respect to such debtor, its property and its creditors and stockholders, as the court has with respect to the other debtor. Creditors of any railroad corporation, having claims aggregating not less than 5 per centum of all the indebtedness of the corporation as shown in the latest annual report which it has filed with the Commission at the time when the petition is filed, may, if the corporation has not filed a petition under this section, file with the court in

which the corporation might file a petition under this section, a petition stating that the corporation is insolvent or unable to meet its debts as they mature and that the creditors have claims aggregating not less than 5 per centum of all such indebtedness of the corporation and propose that it shall effect a reorganization; copies of the petition shall be filed at the same time with the Commission and served upon the corporation. The corporation shall, within ten days after such service, answer the petition. If the answer admits the jurisdiction of the court and the material allegations of the petition, the judge shall enter an order approving the petition as properly filed if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if not so satisfied. If the answer denies either the jurisdiction of the court or any material allegation of the petition, the judge shall summarily determine the issues presented by the pleadings without the intervention of a jury, and if he finds that the material allegations are sustained by the proofs and that the petition complies with this section and has been filed in good faith, the judge shall enter an order approving the petition; otherwise, he shall dismiss the petition. If such a petition is so approved, the proceedings thereon shall continue with like effect as if the railroad corporation had itself filed a petition under this section. If a petition is dismissed, neither the petition nor the answer of a debtor constitute an act of bankruptcy or an admission of insolvency or of inability to meet maturing obligations or be admissible in evidence, without the debtor's consent, in any proceedings then or thereafter pending or commenced under this title or in any State or United States court. If, in any case in which the issues have not already been tried under the provisions of this subdivision, any of the creditors, prior to the hearing provided for in paragraph (1) of subdivision (c) of this section, appear and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, and, unless the material allegations of the petition are sustained by the proofs, shall dismiss the petition.

(b) Plan of reorganization, contents; "securities," "stockholders," "creditors," "claims" defined; suspension of statutes of limitation

A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probably prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or

waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this title, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity

of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 96 of this title shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subdivision (p) of this section. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

(c) Proceedings after approval of petition; orders of State regulatory bodies

After approving the petition:

. . . .

(2) The judge shall fix the amount of the bond of every trustee. He may thereafter terminate any such appointments on cause shown, and may in that event and in the event of a vacancy from any other cause, in the manner and within the qualifications herein provided for the appointment of trustees, appoint a substitute trustee or trustees, and in the same manner and within the same qualifications may appoint an additional trustee, and shall fix the amount of the bond of every such substitute or additional trustee or trustees. The judge shall in his discretion confirm the appointment of such legal counsel for the trustees as they shall select, with power of removal.

The trustee or trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the Commission as reasonable. The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor. In operating the business of the debtor with respect to safety, location of tracks, and terminal facilities, the trustee or trustees shall be subject to lawful orders of State regulatory bodies of statewide jurisdiction to the same extent as would the debtor if a petition respecting it had not been filed under subdivision (a) of this section except that (A) any such order which would require the expenditure, or the incurring of an obligation for the expenditure, of money from the debtor's estate shall not become effective (a) unless the trustee or trustees, with the approval of the court, shall consent thereto, or (b) unless the Commission, upon appropriate application or applications by an interested party or interested parties, shall find that compliance with the order will not impair the ability of the trustee or trustees to perform his or their duties to the public, will not constitute an undue burden upon interstate commerce, will be compatible with the public interest, and will not interfere with the formulation and approval of a satisfactory plan of reorganization for the debtor, and (B) compliance shall be made with any applicable provision of the Interstate Commerce Act. Prior to the appointment of a trustee,

the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe.

(3) The judge may, upon not less than fifteen days' notice published in such manner and in such newspapers as the judge may in his discretion determine, which notice so determined shall be sufficient, for cause shown, and with the approval of the Commission, in accordance with section 20a of title 49, as now or hereafter amended, authorize the trustee or trustees to issue certificates for cash, property, or other consideration approved by the judge, for such lawful purposes and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, or receivership charges, as might in an equity receivership be lawful. Where such certificates are authorized to provide funds to pay for the acquisition, assembly or installation of safety equipment or materials related thereto, or for the purpose of reimbursing the trustee or trustees for funds so expended, the judge may direct (without limitation of his power to make such direction in the absence of this provision) that the certificates shall have such lien on the property of the debtor and shall be entitled to such priority in payments over existing obligations, secured or unsecured, and receivership charges and present or future duties, debts or taxes or other obligations in favor of or payable to any State or any subdivision, agency or instrumentality thereof and interest or penalties, and to such parity with all or any portion of the other costs or expenses of administration or operation as in the particular case the judge may find equitable at the time of author-

izing the issuance of such certificates, regardless of whether such obligations, charges, costs or expenses, duties, debts, or taxes constitute or are secured by liens on real or personal property or shall have become payable before or after the issuance of such certificates.

(o) Abandonment or sale of lines or property

The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by the Interstate Commerce Act, as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subdivision at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. The expense of such sale shall be borne in such manner as the judge may determine to be

equitable. The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

IN THE MATTER OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY *Debtor.*	In Proceedings for the Reorganization of a Railroad No. 77 B 8999

ORDER No. 220C

In accordance with Order No. 220A dated September 27, 1979, this Court's decision dated the same date, and the decision of the Court of Appeals for the Seventh Circuit in *In Re Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, Nos. 79-1494, 79-1675, 79-1683, 79-1698 (7th Cir. Oct. 2, 1979), IT IS HEREBY ORDERED that:

1. Richard B. Ogilvie, as Trustee of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company is directed to embargo at 12:01 a.m., C.D.T., on November 1, 1979 all of the Debtor's freight operations on lines which are not shown on Appendix A, either as solid or dotted lines, nor listed on Appendix B, or Appendix C.

2. The Trustee shall notify the Interstate Commerce Commission of the possible need to direct service over the embargoed lines pursuant to 49 U.S.C. § 11125 and such other authority as the Commission may have and shall consult with the Commission with respect to measures for implementing such service.

3. The Trustee is authorized to file notices of proposed embargoes on all lines not shown on Appendix A, or

listed on Appendix B or Appendix C, or any other notices appropriate under the Interstate Commerce Act and to request the Interstate Commerce Commission and the Association of American Railroads to issue appropriate car service orders.

4. The Trustee shall continue all services and operations not embargoed by this Order and payments under all equipment obligations including leases. Order No. 1 and subsequent Orders in this proceeding shall remain in effect except to the extent that they are inconsistent with this Order.

5. As of November 1, 1979, or as soon thereafter as is practical, the Trustee shall furlough all employees not required for the services and operations continued under paragraph 1 or for the administration of the estate, the protectior of the Debtor's property or the finalization, approval and implementation of a plan of reorganization. The Trustee shall suspend all payments and other benefits to furloughed employees pending the approval of a reorganization plan, except that the Trustee shall pay all furloughed employees for services performed up to the date of furlough at the rate at which payments were actually being made prior to the date of furlough and shall provide medical and dental protection to furloughed non-union employees in accordance with the Debtor's existing plan for the period of such protection provided therein.

6. The Trustee, as far as possible, shall prevent lines over which directed service is to be directed from becoming impassable and shall attempt to seek waivers from the Federal Railroad Administration of the necessity to comply with FRA minimum track standards where the track does not meet those standards.

ENTER:

THOMAS R. MCMILLEN
Thomas R. McMillen
Judge, U.S. District Court

DATED: October 26, 1979

[Appendices A, B and C to Order No. 220C omitted herefrom.]

Service Date: Jan. 16 1980

RB5 INTERSTATE COMMERCE COMMISSION

CERTIFICATE AND DECISION

Finance Docket No. 29096

DURANGO AND SILVERTON NARROW GAUGE RAILROAD COMPANY—ACQUISITION AND OPERATION

Finance Docket No. 29155

DURANGO AND SILVERTON NARROW GAUGE RAILROAD COMPANY—STOCK

Decided: December 19, 1979

By application filed September 17, 1979, in Finance Docket No. 29096, the Durango and Silverton Narrow Gauge Railroad Company (D & SN) seeks a certificate of public convenience and necessity under the provisions of 49 U.S.C. 16901 authorizing the acquisition and operation of an existing line of narrow gauge railroad. This line, known as the Silverton Branch, extends from MP 451.45 in Durango, CO to MP 496.80 in Silverton, CO, a distance of 45.35 miles in La Plata and San Juan Counties.

By concurrent application in Finance Docket No. 29155, filed October 4, 1979 under 49 U.S.C. 11301, D & SN seeks authority to issue 100,000 shares of its authorized common stock without par value, for a stated value of $2,750,000.

Background

Applicant is a corporation organized and existing under the laws of Colorado for the purpose of acquiring, constructing, and operating a railroad, but is *not an operating corporation at the present time.* The existing line of narrow gauge railroad to be acquired is presently owned and operated by the Denver and Rio Grande Western Railroad Company (Rio Grande).

The Silverton Branch was constructed by the Rio Grande in the early 1830's when Silverton was an active mining center and it has undergone several changes of ownership. An application by the Rio Grande to abandon the Silverton Branch was denied by the Commission in 1959. Thereafter an application by the Rio Grande for authority to abandon all of its narrow gauge lines other than the D & SN was granted in 1969. The Silverton Branch was left as an isolated narrow gauge line, wholly situated within the State of Colorado, having no physical connection with any other line of railroad, either narrow or standard gauge. Since then, the Silverton Branch has been operated by the Rio Grande almost exclusively to provide seasonal passenger train service during the period from late May to early October for tourists and sightseers who desire to ride on a vintage narrow gauge train in the area between Durango and Silverton.

No interstate passenger service is provided on the Silverton Branch. Sporadic, limited-volume freight shipments are occasionally transported locally on this branch. Shippers include the Tacoma Power Plant, a United States Forest Service Station, and occasional construction and mining companies.

It is for these reasons that D & SN implies, in several places in its application and pleadings, that this transaction is not within the jurisdiction of this Commission. We disagree with this suggestion and believe that the transaction herein requires Commission approval. The proceeding that permitted abandonment of the narrow gauge lines and isolated the Silverton Branch from all other rail lines was *Denver & R. G. W. R. Co. Abandonment,* 334 I.C.C. 539 (1969). In that decision, Division 3 noted that the owner at that time, Rio Grande, did handle some interstate freight over the Silverton Branch. These shipments moved under through rail rates, with rail service provided at points on the Silverton Branch, with substituted-motor-carrier-for-rail service provided where there

was no regular rail line, and with standard gauge rail service provided elsewhere. The Division also said that, in the absence of abandonment of the Silverton Branch, the Rio Grande would continue to be obligated to provide shippers with the same through service, even though there would be no direct connection with another rail line. Accordingly, the approval was conditioned upon Rio Grande continuing in the absence of abandonment of the Silverton Branch or operations thereover, to provide a through service, at through rates, on interstate traffic. The condition also provided for substituted-motor-carrier-for-rail service where appropriate.

Although the traffic has been only intrastate for the past several years, Rio Grande has continued to maintain those through rates as directed. The applicant states that it will continue to provide the rail service that Rio Grande has been providing. It does not state that it will seek to discontinue those through rates, etc. The fact that there has been no interstate traffic over the line in the past several years does not, in itself, change the character of the line as determined by the Commission. Only a Commission decision permitting discontinuance of interstate operations over that line could have that affect. In the absence of such a decision, the line continues to be interstate in nature and its disposition a matter of Commission jurisdiction.

By the terms of the application in Finance Docket No. 29155, applicant proposes to issue 100,000 shares of common stock without par value. Applicant's articles of incorporation do not provide for any other kind or class of stock. Applicant is authorized to issue a total of 500,000 shares of common stock without par value, none of which has been issued or is currently outstanding. Thus 20% of its total common stock is proposed to be issued under the authority sought by the present application. The stated value of the shares of stock proposed for issuance is $27.50 per share. The aggregate stated value of the stock to be issued will be $2,750,000.

Each share of stock to be issued will have equal voting rights, there are no call provisions, and there are no conversion privileges. Upon payment of the stated value of the shares to be issued, the stock will be fully paid and nonassessable.

The cash proceeds of the proposed securities issuance are earmarked to be used for the acquisition proposed in Finance Docket No. 29096, above, including all of the railroad assets and properties which comprise or are directly associated with that line, for a total price of $2,200,000. The balance of the proceeds are to be used to reimburse estimated organization and other expenses.

In 1978, operation of the line resulted in a loss to Rio Grande, and applicant anticipates Rio Grande will again have a losing operation. Applicant expects to realize an operating profit on the line after an initial first-year deficit. Using the figures estimated by applicant, the cost of acquisition of the line could be recovered in eight to ten years.

Labor Interests

Protests were filed on August 16, 1979, by the Railway Labor Executives' Association (RLEA), and on August 27, 1979, by the Brotherhood of Locomotive Engineers (BLE).

Petitions for leave to intervene were filed by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC) on October 12, 1979; by the Railway Employees' Department (RED) on October 16, 1979; and by the Brotherhood of Maintenance of Way Employees (BMWE) on October 23, 1979. Applicant replied to these petitions. The petitions for leave to intervene will be granted to the extent the petitioners will be considered parties to the same extent as the initial protestants.

The protestants and petitioners all seek protective conditions for those employees of Rio Grande who might be

adversely affected by the D & SN acquisition of the Silverton Branch. Involved are certain employees who are assigned to the Branch all year long and others, who are full-time Rio Grande employees, but who work on the Branch only during the season.

Applicant points out that the Commission has discretion to impose labor protective conditions in situations such as this and argues that, if conditions are imposed, they should be limited to those imposed in *Chicago, B & Q. R. Co. Abondonment,* 257 I.C.C. 700 (1944).

While the Commission is not required by statute to impose labor protective conditions in proceedings where newly formed non-carriers will become carriers through the acquisition and operation of lines of railroad as here, it does have the discretion to do so where the interests of employees may be adversely affected by the proposal. In *Prarie Trunk Railway—Acquisition and Operations,* 348 I.C.C. 832 (1977) and *Cadillac & Lake City Ry. Co. Acquisition and Operation,* 320 I.C.C. 617 (1964), the Commission imposed such conditions, with the costs to be borne by the selling carrier. In both cases, the vendors had filed abandonment applications for the rail lines in question, but those applications were dismissed. Notwithstanding the dismissal of the abandonment applications, the Commission, in each case, noted that the principle result or benefit of the proposal would be the cessation by the vendor of operation of the line. Since employees of the vendors would be affected by the proposal and since each vendee was a new carrier that had not operated previously, the Commission imposed the burden of labor protection costs upon the vendors. See *Prarie Trunk Railway—Acquisition and Operation, supra,* at page 852 and *Cadillac & Lake City Ry. Co. Acquisition and Operation, supra,* at page 618-619.

The instant proceeding differs somewhat from *Prarie Trunk* in that the vendor, Rio Grande, has not expressed a

willingness to bear the costs of labor protection. It also differs from both *Prarie Trunk* and *Cadillac* in that vendor has not filed an abandonment application for the line to cease operation thereof. The principle is the same, however, since Rio Grande is disposing of a losing operation. The burden on D & SN of institution of operations over such a line will be great enough without the additional costs of labor protection for the Rio Grande employees that are not employed in the new operation. Accordingly, the costs of labor protective conditions imposed herein shall be borne by Rio Grande. While it is true that Rio Grande is not a party, per se, to the application in Finance Docket No. 29096, it is a party to the purchase agreement which is a part of that application. It is through this that we have the authority to impose these labor protective costs upon that carrier.

In view of the reasoning of the Commission in imposing the burden of labor protection on the vendors in the *Prarie Trunk* and *Cadillac* cases, the conditions imposed were those imposed in *Chicago, B. & Q. R. Co. Abandonment, supra,* which was the normal protection afforded in abandonment proceedings at that time. After enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, the Commission reviewed the area of labor protective conditions. It determined the proper quantum of such protection was that which is described in *Oregon Short Line R. Co.—Abandonment—Goshen,* 354 I.C.C. 76 (1977), as modified in 354 I.C.C. 584 (1978), and as finally modified in 360 I.C.C. 91 (1979). It is that protection which we will impose in this instance.

In Finance Docket No. 29096, we find that (a) the interests of employees will be protected by the imposition of appropriate conditions; (b) the terms of the transaction are just and reasonable and the transaction is consistent with the public interest; and (e) the proposal will not have an adverse impact upon the environment nor upon energy conservation.

In Finance Docket No. 29155, we find that the proposed issuance (a) is for a lawful object within applicant's corporate purpose, and is reasonably appropriate for that purpose; (b) is compatible with the public interest; (c) is appropriate for or consistent with the proper performance by applicant of service to the public as a common carrier; (d) will not impair its financial ability to provide the service; and (e) will not have an adverse impact upon the environment nor upon energy conservation.

It is certified:

In Finance Docket No. 29096, that the present and future public convenience and necessity require the proposed acquisition and operation by Durango and Silverton Narrow Guage Railway Company of the line described above, subject to imposition of labor protective conditions described in *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979), with the costs to be borne by the Denver and Rio Grande Western Railroad Company.

It is ordered:

(a) In Finance Docket No. 29096:

(1) The petitions for leave to intervene filed by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees; the Railway Employees' Department; and the Brotherhood of Maintenance of Way Employees are granted to the extent stated above.

(2) This certificate shall be effective on the date served.

(3) If the authority granted in this certificate and decision is not exercised within one year from the effective date, it shall be of no further force and effect.

(4) Within 15 days after consummation and commencement of operations, applicant shall give the Commission written notice of the dates of consummation and commencement of operations.

(5) Within 60 days after consummation, applicant shall submit to the Commission two copies of the journal entries required to record the transaction.

(6) When applicant establishes rates and charges applicable to the line which it will operate, it shall refer to this certificate and decision by the docket number and date of decision.

(b) In Finance Docket No. 29155:

(1) The application is approved and the Durango and Silverton Narrow Guage Railway Company is authorized to issue 100,000 shares of its authorized common stock within par value, for the purpose stated above, for a stated value of $2,750,000.

4. Except as authorized, the warrants and stock proposed to be issued shall not be sold, pledged, repledged or otherwise disposed of by the applicant unless or until so ordered or approved by this Commission.

5. Applicant shall report concerning the matters involved in conformity with the procedures stated in 49 C.F.R. 1115.6.

6. Applicant shall submit for consideration of this Commission three copies of the journal entries required to record the transaction.

7. Pursuant to 49 U.S.C. 11301, the Commission reserves the right to make any supplemental decisions herein as it may deem necessary.

8. Nothing herein shall be construed to imply any guaranty or obligation as to said stock or dividends thereon on the part of the United States.

By the Commission, Review Board Number 5, Members Krock, Pohost, and Taylor.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

Opposition

2

Office - Supreme Court, U.S.
FILED
FEB 3 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1250

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

RICHARD B. OGILVIE, Trustee Of The Chicago, Milwaukee, St. Paul & Pacific Railroad Company; STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION; STATE OF SOUTH DAKOTA; PORT OF PEND OREILLE; PEND OREILLE VALLEY RAILROAD COMPANY, INC.; SEATTLE & NORTH COAST RAILROAD COMPANY; FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; GIRARD BANK, as Indenture Trustee; HARRIS TRUST AND SAVINGS BANK, as Indenture Trustee; and the CHICAGO MILWAUKEE CORPORATION;
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF IN OPPOSITION OF PORT OF PEND OREILLE, PEND OREILLE VALLEY RAILROAD COMPANY, INC., AND SEATTLE & NORTH COAST RAILROAD COMPANY

Of Counsel:
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TABLE OF AUTHORITIES

CASES RELIED UPON:

In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 658 F.2d 1149 (7th Cir. 1981) 3, 4, 5

In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co., Order No. 297 (N.D. Ill., Feb. 29, 1980) (unreported decision, reproduced in Appendix to Petition for Certiorari at 80a) 5

Magnum Import Co. v. Coty, 262 U.S. 159 (1923) 2

STATUTES & RULES RELIED UPON:

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Milwaukee Railroad Restructuring Act, §5, 45 U.S.C. §904 2, 3

Supreme Court Rule 17 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1250

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Petitioner,

v.

RICHARD B. OGILVIE, *et al.*,

Respondents.

BRIEF IN OPPOSITION OF PORT OF PEND OREILLE, PEND OREILLE VALLEY RAILROAD COMPANY, INC., AND SEATTLE & NORTH COAST RAILROAD COMPANY*

Respondents, Port of Pend Oreille, Pend Oreille Valley Railroad Company, Inc., and Seattle & North Coast Railroad Company (hereinafter "Respondents"), respectfully request that this Court deny the petition for certiorari filed by the Railway Labor Executives' Association (hereinafter "RLEA").

This Brief in Opposition will discuss questions 2 and 3 of the petition. These questions involve essentially the same issue, which arises out of the abandonment of certain rail lines of the bankrupt Chicago, Milwaukee, St. Paul & Pacific Railroad ("Milwaukee"), subject to assumption by the Trustee of the Milwaukee of labor protective conditions. The issue is whether the United States Court of Appeals for the Seventh Circuit correctly affirmed the United States District Court for the

*Pend Oreille Valley Railroad Company is a subsidiary of Kyle Railways, Inc. Seattle & North Coast Railroad Company is a subsidiary of North Coast Lines, Inc.

Northern District of Illinois (acting as a railroad reorganization court) — which in turn followed decisions of the Interstate Commerce Commission ("ICC") and of a special master in the reorganization proceeding — in its refusal to impose labor protective conditions and collective bargaining obligations upon certain non-carrier purchasers of abandoned Milwaukee lines, including Respondents. In a separate Brief in Opposition, the Trustee is expected to respond to question 1 of the petition.

Defining the labor obligations of a non-carrier purchaser of an abandoned Milwaukee line must be among the most narrow issues of statutory construction that one might imagine. The principal statute construed by the courts below is Section 5 of the Milwaukee Railroad Restructuring Act ("MRRA"), 45 U.S.C. § 904. As its name implies, the MRRA was adopted in 1979 to facilitate the reorganization of one railroad, the Milwaukee, and decisions construing the MRRA have no precedental value with regard to other railroad reorganizations, much less any impact upon any matter of national significance of the type with which this Court is usually concerned when it exercises its certiorari jurisdiction.

The decisions below involve careful analyses of statutory language, legislative history, ICC practice, and the policies underlying railroad reorganizations. Petitioner RLEA's arguments — the same arguments made here — were considered painstakingly and rejected after lengthy explanation. Unhappy with the results below, RLEA now asks this Court to grant certiorari, ignoring Chief Justice Taft's admonition — made nearly sixty years ago but more true than ever today — that "[t]he [certiorari] jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923).

As RLEA acknowledges, the Seventh Circuit's decision herein "is the first appellate court decision on this issue," Pet. at 26, and there is thus neither a conflict among the circuits nor

any reason to believe that this issue will recur with any frequency in the federal courts.[1] The issue, moreover, was decided correctly by the Seventh Circuit. The crux of RLEA's argument is that these particular transactions, which involve abandonment of lines by the Milwaukee and subsequent purchase by non-carriers, fall under Section 5(b) of the MRRA, which governs continued rail operations over the Milwaukee's lines by existing carriers, rather than Section 5(a), which governs line abandonments by the Milwaukee. In its closely reasoned and thoroughly documented opinion, the Court of Appeals rejected RLEA's position:

> Examination of the effect of Section 5 upon Section 77(o) of the Bankruptcy Act, 11 U.S.C. § 205(o) (repealed 1978), as well as reference to the MRRA itself and to the previously detailed maxims of statutory construction compels us to conclude that RLEA's argument is without merit. RLEA, in addition, is unable to cite any relevant statutory or decisional authority for its position. . . . [I]t is fundamental error and is contrary to decisional precedent to determine as RLEA would have us do that Section 5(a) is rendered irrelevant when an abandonment is followed by a sale to a non-carrier. . . .
>
> In any event, Section 5(b) is not as efficacious as RLEA would have us believe. In *no instance* . . . would Section 5(b) automatically extend responsibility for protective conditions to the non-carrier purchasers. Even if Section 5(b) were applicable, the court is empowered to, and realistically could limit the responsibility to the Milwaukee estate alone. . . .
>
> Furthermore, RLEA's interpretation would defeat the intent and purpose of Congress in facilitating the Mil-

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[1] Indeed, it is doubtful that there will ever be a conflict among the circuits, or even decisions of other circuits, with regard to construction of the MRRA, since actions under this statute will for the most part be resolved in the Seventh Circuit.

> waukee reorganization and would frustrate the primary objective thought to be advanced within the MRRA.

App. at 44a-45a (emphasis in original).

The last of the factors mentioned above by the court, the policies underlying the MRRA and the Milwaukee reorganization, is particularly important. Adoption of RLEA's arguments would lead to a situation harmful to all concerned, including especially the localities in which the Milwaukee's abandoned lines lie and the employees who worked for the Milwaukee in these areas. As the Court of Appeals found, relief from burdensome railway labor conditions — including, *inter alia*, featherbedding provisions, generous benefit packages, and the like — was the *sine qua non* of the purchases of abandoned lines by Respondents herein and others.

In order "to make a going business over lines which have previously been operationally uneconomical," it was critical that the new operators not be saddled with the labor provisions that helped to drive the Milwaukee to bankruptcy. *Id.* at 41a. By requiring the Milwaukee estate rather than the purchasers to bear the costs of labor protection, moreover, Congress in the MRRA ensured fairness even for the bankrupt, which "reap[ed] a significant benefit in the form of savings realized by the discontinuance of uneconomic and cumbersome rail service." *Id.* Had the RLEA position prevailed, by contrast, the purchasers of abandoned Milwaukee lines would have been required "to divert scarce investment and start-up funds to finance employee benefits, wage rates, and other conditions without regard to the extent the conditions are mandated by existing market conditions," and as a result "future rail service over many of the lines, as the record reveals, would [have been] rendered wholly unfeasible." *Id.* at 46a. [2]

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[2] In this context, it is significant that the primary purpose for Respondents' existence is to ensure local rail service, despite a recognition of the many economic difficulties involved. Respondent Port of Pend Oreille was estab-

In addition to these legal and policy considerations that militate against a grant of certiorari, there is one other significant fact that reduces to nil whatever scintilla of importance the MRRA issue in this case might otherwise have had. Regardless of the outcome of this case, the employees and former employees of the Milwaukee are guaranteed protection to the full extent that such protection is ever provided in a railroad reorganization situation. *See* 7th Cir. op., *id.* at 2a-10a. The courts below imposed labor protection provisions on the Trustee of the Milwaukee estate, and the Trustee has indicated his willingness to "bear the full costs of these protections," as the District Court noted. App. at 83a. *See also* 7th Cir. op., App. at 39a n.47. There has not been any suggestion herein that the Trustee intends to abandon, or to seek relief from, his commitment to the Milwaukee's employees. Under the circumstances, there is no reason to believe that any employee or former employee of the Milwaukee will suffer any injury as a result of the decisions below. [3]

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lished by the voters of Pend Oreille County in a referendum for the express purpose of acquiring the railroad line being abandoned by the Milwaukee and, one way or another, attempting to make it viable. The Port subsequently contracted with the Pend Oreille Valley Railroad Company, which, as the name implies, provides local service in the Pend Oreille area. Similarly, Respondent Seattle & North Coast Railroad Company was created expressly to render local service over another line being abandoned by the Milwaukee.

[3] In addition, the unions themselves have recognized that the long-term interests of their members can be best protected by encouraging the continued operation of lines abandoned by the Milwaukee. In 1980, representatives of the various rail unions met in Miami with representatives of the railroads regarding the Milwaukee and another bankrupt railroad, the Rock Island. The agreement reached at this meeting, known as the "Miami Accords," provides that, when a Milwaukee or Rock Island line is acquired by a trunk-line railroad, the purchaser need hire only as many of the bankrupt railroad's employees as its operations require and that the terms and conditions of employment for employees so hired need be no different than the terms and conditions provided to other employees of the purchaser.

In summary, there is no issue of law, fact, or policy presented by the petition that comes even remotely close to meeting the standard of Supreme Court Rule 17, which requires "special and important reasons" for granting certiorari. RLEA's position has been consistently rejected by the lower courts, which have carefully analyzed the MRRA and its historical and policy context. The MRRA, moreover, is hardly the kind of statute that this Court should be spending its time interpreting, since it was passed to effectuate the reorganization of just one railroad, and since, even as to this railroad, questions of MRRA statutory interpretation are likely to arise very infrequently and then only in the Seventh Circuit. *See* note 1 *supra*. It would be improvident for this Court to grant certiorari to decide which of two subsections of one section of this special purpose statute should apply here, especially when the Court of Appeals and the District Court exhaustively considered this issue.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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Opposition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner

v.

RICHARD B. OGILVIE, TRUSTEE, *et al.*
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATE OF SOUTH DAKOTA IN OPPOSITION

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IN THE

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No. 81-1250

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Petitioner

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Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATE OF SOUTH DAKOTA IN OPPOSITION

STATEMENT

1. In December 1977 the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereafter the "Milwaukee") filed a petition for reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. §205 (repealed in 1978). The railroad continued to suffer large operating losses, and in September 1979 the reorganization court granted the petition of the Milwaukee Trustee to embargo (*i.e.*, cease operations over) all except a core portion of the Milwaukee system effective November 1, 1979.

Congress responded to the imminent loss of service by enacting the Milwaukee Railroad Restructuring Act ("MRRA"), Pub. L. No. 96-101, 93 Stat. 746, 45 U.S.C. §901

et. seq. Three provisions of that Act are pertinent to this case. First, Section 5(a)(1) of the MRRA, 45 U.S.C. §904(a)(1), empowered the reorganization court to authorize the Milwaukee to abandon lines of railroad (a power previously reserved to the Interstate Commerce Commission),[1] but directed the court in the case of such abandonments to "require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49 of the United States Code" (often referred to as the *"New York Dock"* level of employee protection (*see* Pet. App. 2a-10a)). Second, Section 5(b)(1), 49 U.S.C. §904(b)(i), empowered the court, subject to the approval of the Commission, to authorize "the sale or transfer of a line to be used in continued rail operations." In the case of such sales or transfers, Section 5(b) directed that "the court shall provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of title 49 of the United States Code."

Third, Section 9 of the MRRA, 45 U.S.C. §908, in conjunction with several other sections, established a mechanism by which Milwaukee employees adversely affected by abandonments, sales or other restructuring transactions could elect either (1) to claim from the Milwaukee the full level of protections provided by Section 5 and other statutory provisions; or (2) to immediately receive a reduced level of benefits from a federally financed fund of $75 million, but thereby waive all other claims to employee protection. *See* Pet. App. 12a-13a.

2. Pursuant to the MRRA, the Milwaukee Trustee petitioned the reorganization court for authority to abandon certain

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[1] Prior to the 1978 revision of the Bankruptcy Act, railroads, including those in reorganization, could abandon rail lines only after approval of the Commission under the Interstate Commerce Act (49 U.S.C. §11901). In 1978 Congress empowered reorganization courts to authorize abandonments by railroads in reorganization (Pub. L. 95-598, 11 U.S.C. §1170); although that statute requires the Commission to make a report on such abandonments, the Commission's role is only advisory. The new statute, however, was not made applicable to railroads, like the Milwaukee, which had petitioned for reorganization prior to its effective date. *See* Section 403 of Pub. L. 95-598, 92 Stat. 2683. Section 5(a) of the MRRA made Section 1170 of the 1978 bankruptcy revision applicable to the Milwaukee.

non-core lines and then to sell those abandoned lines to several purchasers, including the State of Wisconsin. The purchasers, which had not previously operated as railroads, intended to provide rail service over the lines, either directly or through contract operators, after obtaining appropriate operating authority from the Interstate Commerce Commission.

Petitioner argued in the reorganization court that the transactions should not be handled as abandonments under Section 5(a) of the MRRA—in which case the obligation to provide labor protection would be imposed on the Milwaukee, as the abandoning carrier. Instead, petitioner claimed that the transactions should be handled under Section 5(b) as the sales or transfers of lines to be used in continued rail operations. Notwithstanding the absence of any support in the statutory language, petitioner argued that Section 5(b) would require the obligation to provide labor protection be imposed on the acquiring entities.

Following the report of its special master, the reorganization court rejected petitioner's arguments. It approved the abandonments and sales and, in so doing, imposed on the Milwaukee the obligation to provide *New York Dock* protections to any adversely affected employees (Pet. App. 80a-84a, 104a-106a).[2] The court also adopted the special master's recommendation that the Milwaukee's obligation to provide labor protection should be deferred until consummation of the reorganization proceedings (Pet. 13, Pet. App. 57a-58a).

3. Petitioner appealed both aspects of the reorganization court's decision. The State of South Dakota intervened as an appellee because, like the State of Wisconsin, it was in the process of acquiring abandoned Milwaukee lines to provide for the continuation of essential rail services. Accordingly, South Dakota has a vital interest in ensuring that it can do so without the very substantial burden of labor protection that RLEA's

[2] The reorganization court actually authorized protections which, as the court of appeals noted (Pet. App. 3a) "slightly modify the customary levels of protections." Petitioner unsuccessfully challenged those modifications on appeal (*see* Pet. App. 1a-10a), but does not present that issue for this Court's review. *See* Pet. 12, n.6.

position would, if sustained, impose on it—a burden which, as a practical matter, would preclude states like South Dakota from continuing rail service that would otherwise have been abandoned.

The court of appeals affirmed (Pet. App. 1a-51a). First, it upheld the Milwaukee's authority to defer payments of employee protection obligations. It did so after carefully reviewing the language, structure and legislative history of the MRRA and after noting that any immediate payment of obligations resulting from necessary abandonments "would preclude any possibility of reorganization whatsoever . . . ." (Pet. App. 11a-12a, 13a-32a).

The court also affirmed the ruling that the abandonment and sale of Milwaukee lines to entities, like the States of South Dakota and Wisconsin, that are not existing rail carriers are governed by Section 5(a) of the MRRA, and that labor protection for adversely affected employees is an obligation properly imposed on the Milwaukee (Pet. App. 32a-51a). Like the reorganization court, the court of appeals based its conclusion on a long and well established line of ICC and court decisions that distinguishes for purposes of labor protection between a railroad's sale or transfer of a line to another existing railroad and its transfer to non-carriers intending to commence operations for the first time (*id.* at 37a-41a). The court's review of the language, history and basic purposes of the MRRA led it to conclude that the MRRA did not intend to disturb, but instead supports, that well established distinction (*id* at 42a-47a). In this connection the court stated (*id* at 41a-42a; footnote and citations omitted):

> . . . [P]lacing responsibility for benefit payments upon the abandoning carrier alone in instances where the line is eventually acquired by a non-carrier advances the need for continued rail service over the lines. This imposition protects as well as assists the new operators of these new business enterprises in their efforts to make a going business over lines which have previously been operationally uneconomical.

> . . . The burden upon the new operator, upon commencement of line operation, will be great enough without the additional costs of labor protection.

ARGUMENT

1. This case presents no conflict among the circuits, no issue of general or continuing importance, nor any other reason for this Court's review. Indeed, it would be difficult to imagine a case more narrowly confined to the particular circumstances and less appropriate for this Court's consideration.

First, the issues that petitioner presents for the Court's review concern the proper construction of certain provisions of the Milwaukee Railroad Restructuring Act, which, as petitioner concedes (Pet. 22), apply only to the pending reorganization of one railroad. The court of appeals' decision turned on its close analysis of the particular language and legislative history of that Act, and would be of limited, if any, significance in other contexts. Although petitioner attempts to suggest (Pet. 22) that the resolution of these issues may be relevant to more general provisions in the Bankruptcy Act, petitioner overlooks the fact that the court of appeals' analysis and conclusions rested heavily on the mechanism that Section 9 of the MRRA established for providing adversely affected Milwaukee employees with immediate benefits in lieu of the traditional *New York Dock* protections. *See* Pet. App. 12a-19a, 45a-46a & n.55. That mechanism was enacted for the specific benefit of Milwaukee employees and is not generally applicable under the bankruptcy code.

Furthermore, the issues petitioner wishes this Court to review are of limited significance even to the employees of the Milwaukee. Petitioner's issues and contentions pertain only to the traditional, *New York Dock*, employee protections mandated by 49 U.S.C. § 11347. But those issues are of concern only to Milwaukee employees (if there are any) who have not elected to receive immediate benefits from the $75 million fund established by Section 9 and other sections of the MRRA. Moreoever, even as to such non-electing employees, there is no dispute about their basic entitlement to the traditional *New*

York Dock protections; as in the court of appeals, petitioner only challenges the deferral of those protections and the failure to impose the obligation to provide them on non-carrier acquiring entities.

2. In any event, the decision of the court of appeals was correct.

a. Petitioner's claim (Pet. 20-24) that the courts below erred in authorizing the Milwaukee to defer payment of its labor protection obligations until the completion of the reorganization proceeding is principally of concern to the Trustee, and we expect him to address that issue more fully. We would only note that petitioner's argument fails entirely to address the principal basis for the court of appeals' conclusion on this point—namely, that the mechanism established by Section 9 for the immediate payment (as expenses of administration) of a reduced level of benefits warrants the inference that the MRRA intended that the traditional benefits would *not* be immediately payable as expenses of administration. Pet. App. 14a-19a. Furthermore, petitioner does not deny the court of appeals' observation (Pet. App. 11a-12a) that the immediate payment of the full *New York Dock* protections would be impossible and would preclude any hope of successful reorganization.

b. Petitioner's further contention (Pet. 25-28) that the courts below were required to impose traditional labor protection on non-carriers acquiring abandoned Milwaukee lines—which presents the issue of principal concern to the State of South Dakota—is entirely without merit.[3] The court of appeals correctly declined to impose those obligations on non-carriers on the basis of a well established line of ICC and court decisions holding that the sale of a railroad line to an entity that had not previously been a rail carrier is properly treated, for labor

[3] Petitioner divides this issue into two questions (Pet i; questions 2 and 3), but addresses it in one argument (Pet. 25-28), and we shall discuss it as one issue.

protection purposes, as an abandonment under former Section 1(18) of the Interstate Commerce Act (now codified in 49 U.S.C. §11901) followed by a sale of the abandoned property, and is not properly treated as a consolidation of properties by existing carriers under former Section 5(2) of that Act (now 49 U.S.C. 11343). *See* Pet.App. 37a-41a; *People ex rel. Illinois* v. *United States,* 604 F.2d 519, 524-525 (7th Cir. 1979), *cert. denied* 445 U.S. 951 (1980), and cases cited therein. The court also correctly concluded that Section 5 of the MRRA did not alter that distinction. Petitioner's arguments, however, make no mention of that distinction or of the settled line of cases applying it.

Nor does petitioner deny the very substantial policy reasons underlying the rule against applying labor protection obligations on non-carriers, which apply fully in this case. Unlike lines desired and acquired by other railroads for their own uses, these are lines that, but for their acquisition by a non-carrier, would be abandoned for rail service because they have been operationally uneconomical. To impose labor protection obligations on such acquiring non-carriers, as petitioner insists, would, as the court of appeals noted (Pet. App. 45a-46a; footnote omitted)

> frustrate the primary objectives sought to be advanced within the MRRA. These objectives include expeditious and successful reorganization of the Milwaukee, preservation of essential rail service to the maximum extent possible, and avoidance of potential unemployment as well as damage to the regional and national economy. MRRA Section 2(b), 45 U.S.C. §901(b) (Supp. III 1979). The record indicates that if RLEA is correct in its view of Section 5(b)'s applicability, the acquisitions at bar would not have occurred, as the states and other acquiring non-carrier entities would be required to divert scarce investment and start-up funds to finance employee benefits, wage rates, and other conditions without regard to the extent the conditions are mandated by existing market conditions. If the acquiring entities are burdened with these requirements, future rail

service over many of the lines, as the record reveals, would be rendered wholly unfeasible.

These observations are particularly apposite to the efforts of the State of South Dakota to preserve essential rail service for the benefit of its citizens and, indeed, the entire nation's agricultural production. South Dakota has acquired and arranged for the operation of a substantial portion of the Milwaukee's former lines in the State. It is exceedingly doubtful that this would have been possible if the State had been required to assume substantial labor protection obligations. Petitioner's efforts to impose those obligations on the State, notwithstanding the policies and practical consequences that it does not deny, are without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 1982

Opposition

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No. 81-1250

IN THE

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October Term, 1981

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Petitioner,

v.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Faced with a crisis in transportation services from the defaulting Milwaukee Road (MILW), the Wisconsin Legislature in 1977 empowered its Department of Transportation (DOT) to acquire rail property "which has been abandoned." Chapter 29, sec. 1343, Laws of

1977, creating sec. 195.199, Wis. Stats., later renumbered as sec. 85.09, Wis. Stats., by ch. 34, sec. 1018, Wisconsin Laws of 1979. The Wisconsin Legislature made a specific finding that "private capital and local government contributions are insufficient to prevent the breakdown of rail service." Sec. 85.08 (4m), Wis. Stats.

Under this statutory authority to acquire abandoned rail property, Wisconsin, on January 9, 1980, moved the Reorganization Court and on January 11, 1980, moved the Interstate Commerce Commission (ICC) for approval of the abandonment of certain MILW property and its acquisition by Wisconsin.

On January 21, 1980, the Reorganization Court, in Order No. 281, approved the stipulation between the Trustee and Wisconsin for acquisition if abandonment was approved. Further, this order directed the ICC to act on Wisconsin's application by February 1, 1980, for certain lines, and by March 1, 1980, for other lines.

On January 30, 1980, the ICC approved the Wisconsin acquisition of the first group of six lines. Its decision noted that this group of lines had been authorized for abandonment by the ICC and recommended for abandonment to the Reorganization Court. The ICC also noted that Wisconsin did not propose to operate on any of the land and track that it purchased. The decision emphasized that any subsequent operator on Wisconsin's property would have to file an independent and separate application under 49 U.S.C. sec. 10901 for a certificate to operate. None of these lines had been included in any of the reorganization plans which had been filed with the ICC. No other offers to purchase or to operate these lines had been filed with the ICC. Accordingly, the ICC concluded that "service on these lines will, in all likelihood, *not* continue unless WISDOT is allowed to acquire these lines." (Emphasis added.) Most significantly, the ICC

found that "no employees will be adversely affected" by WISDOT's acquisition of the abandoned land and track. (App. 107a-111a.)

Similarly, on February 28, 1980, the ICC approved Wisconsin's acquisition of the remaining lines. The ICC noted that these lines were not included within the reorganization plans filed with the ICC and that no other offers to purchase or operate the lines had been filed. Finally, the ICC said, "service on these lines in all likelihood will not continue unless WISDOT is allowed to acquire these lines," and no employes will be adversely affected by Wisconsin's acquisition of these abandoned lines. (App. 113a-118a.)

The Reorganization Court approved all of the separate abandonments by orders of February 19, 1980 (Order No. 281A) and March 10, 1980 (Order No. 281B). In each order, the court provided that the affected MILW employes would receive protection from the estate of the MILW and that Wisconsin "shall have no liability in connection therewith." (App. 104a, 105a.)

The Railway Labor Executives' Association (RLEA) moved the court to reconsider its order relieving Wisconsin of liability for MILW employe protection. Wisconsin's response pointed out that it has no authority to operate the rail lines. Under Wisconsin law, it could only assist local units of government in arranging for new service.

The Reorganization Court denied RLEA's motion by order dated March 27, 1980 (Order No 281C). (App. 106a.) The court adopted the rationale of its February 29, 1980, order (Order No. 297). (App. 80a-84a.) In Order No. 281C, the court reaffirmed that in the context of a carrier's sale to a noncarrier purchaser, the purchaser is not bound by the labor protective conditions imposed on the abandoning carrier. The

court further noted that Wisconsin has no intention of operating the acquired lines itself. (App. 106a.)

As the ICC found, Wisconsin is "turning these lines over to local governments who will contract with newly formed, short-line rail operators." *State of Wisconsin-Acquisition,* Finance Docket No. 29237, August 4, 1980.

> These Wisconsin counties and cities do not provide any rail service for compensation. They simply permit an operator on their track and [Wisconsin] land and hope the operator can break even or turn a profit with a minimum contribution of public moneys for track maintenance and rehabilitation. [WISDOT comment, p. 1.]

Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 137 (1980).

The key facts noted in the decision of the court of appeals are that Wisconsin would merely own the lines. "Actual operation over the lines by local municipalities, counties, or their selected operators" required independent ICC approval. (App. 35a.) Further, whereas the acquiring body in other cases either would obtain operating authority directly, or might seek to arrange for third parties to obtain ICC operating authority, Wisconsin would do nothing to aid the operators in obtaining ICC authority. (App. 36a.)

ARGUMENT

The Petition Should Be Denied

A. The criteria for certiorari are not met

Petitioner wholly fails to meet the standard criteria for issuance of the writ.

In this argument, Wisconsin will speak only to the second and third questions petitioner submits.

Petitioner shows no conflict with decisions of this Court, the courts of appeals, or state courts. The reason petitioner cannot do so is that the Milwaukee Road Restructuring Act (MRRA), 45 U.S.C. secs. 901-22, is confined in its scope to the debtor MILW where jurisdiction over reorganization is confined to a single district in a single circuit.

A corollary to the singularity of this legislation is that Congress has taken this matter in hand in a unique way. Its close oversight has resulted in legislation for a single debtor. Should the judicial construction of the congressional program need curative treatment, the remedy is peculiarly for the Congress.

Petitioner asserts an interest in finality on the question whether the level of benefits requires the acquiring body to assume employe protective obligations. But finality is more quickly served by denial of the petition.

B. There is neither error nor a substantial question

Petitioner contends that sec. 5 (b) [45 U.S.C. sec. 904 (b)] rather than sec. 5 (a) [45 U.S.C. sec. 904 (a)] of the MRRA controls. It admits Wisconsin acquired the

lines after abandonment, which is covered by 5 (a). Its premise is that if an abandonment is followed by a sale, transfer, or any other acquisition, 5 (a) becomes inapplicable. But 5 (a) on its face applies whether or not an abandonment is followed by a sale or transfer.

Moreover, the ICC itself has affirmed the correctness of the lower court's understanding that labor protection conditions are imposed on the vendor in an abandonment rather than on the noncarrier acquirer, even if the transferee is applying for authority to operate as a carrier. *Seattle & North Coast Railroad Company Acquisition,* Finance Docket No. 29158F, July 22, 1980. In doing so, the ICC has weighed the fact that cash is infused into the vendor, the destructive effect of imposing these conditions on a fledgling enterprise, and the overall legislative purpose to have rail service. *See, Durango and S.N.G.I. Co. — Acquisition and Operations,* 363 I.C.C. 292, 295 (1979). As stated by the ICC in recently streamlining the procedures for start-up operations of new carriers, *Common Carrier Status of States, State Agencies,* 363 I.C.C. 132, 136 (1980):

> All rail lines exempted here will have been approved for abandonment and employees protective conditions will have been imposed on the abandoning carrier.
>
> The purpose of this proceeding is to facilitate the acquisition and operation of lines for which service by the current carrier will in all likelihood not be continued. This purpose clearly fulfills our most fundamental congressional mandate: to ensure the development, coordination, and preservation of a transportation system. This proposal should increase employment opportunities for railroad employees.

In addition, the ICC also confirmed the correctness of the court's understanding that protective conditions are imposed on the vendor even if its prior abandonment application is dismissed. 363 I.C.C. at 135.

The Reorganization Court noted the firm congressional intent that nothing in the MRRA intended to "'change existing law with respect to employee protection.'" (Order No. 297; App. 82a.) *See also,* 45 U.S.C. sec. 904 (c) ("Nothing in this section shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this chapter.") And *see* the history of the Rock Island Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399, sec. 122, that there was no intent to change ICC policy "nor to require newly formed carriers to assume collective bargaining obligations or union representation." H.R. Rep. No. 1041, 96th Congress, 2d Session (May 20, 1980) at 34.

Moreover, 5 (b) will not do the job petitioner wants it to do. In no event would 5 (b) extend protective conditions to a noncarrier. The court, in authorizing a sale or transfer previously approved by the ICC, shall "provide a fair arrangement" for the affected MILW employes. 45 U.S.C. sec. 904 (b) (1) [5 (b), MRRA]. Wisconsin's acquisition, however, did not adversely affect any MILW employe, as the ICC twice has found. (App. 107a, 113a.) The abandonment adversely affected them, not the acquisition occurring thereafter. And even if the acquisition left affected MILW employes in its wake, nothing in 5 (b) compels the court to impose RLEA's demands on a noncarrier. That subsection calls only for the imposition of a "fair arrangement," which at most appeals to the discretion of the court in carrying out the overall congressional objectives.

In fact, however, even 5 (b) limits the court so that it may impose the protective conditions only on rail carriers. This conclusion follows from: (a) 5 (b) specifically identifies only a "purchasing carrier" when itemizing protective conditions; (b) it expressly adverts to the minimal conditions of 49 U.S.C. sec. 11347; and (c) the latter section by its own terms refers only to imposing the conditions on rail carriers. Congress was fully aware that in the MILW reorganization there might be sales or transfers to a rail carrier "or any other person." 45 U.S.C. sec. 903. Yet it imposed protective conditions only on carriers.

It is undisputed that Wisconsin is not a carrier. *See* 49 U.S.C. sec. 10102 (2). It has no statutory authority to operate as a carrier. *See* sec. 85.09, Wis. Stats. Its state constitutional prohibition on involvement in works of internal improvement prevents it from operating a railroad. *See, State ex rel. Jones v. Froehlich,* 115 Wis. 32, 41, 91 N.W. 115, 118 (1902). Wisconsin merely turns over the acquired lines to local units of government with the hope they can entice new enterprise.

Finally, petitioner's construction would abort the congressional objective to preserve both rail service and jobs. 45 U.S.C. sec. 901 (b). As the ICC found, if these conditions were imposed, "new enterprises would be discouraged from starting up. The result would be even more railroad employees out of work." *State of Wisconsin-Acquisition,* Finance Docket No. 29237, August 4, 1980.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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